APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 95-1371

ROBOSERVE, INCORPORATED,
a Delaware corporation,
Plaintiff-Appellee,

v.

KATO KAGAKU COMPANY, LIMITED,
a Japanese company,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 92 C 5248—Brian Barnett Duff, *Judge*

ARGUED SEPTEMBER 7, 1995—
DECIDED FEBRUARY 23, 1996

Before RIPPLE, MANION, and KANNE, Circuit Judges.

MANION, *Circuit Judge.* On August 4, 1992, Roboserve, Inc. ("Roboserve"), sued Kato Kagaku Co., Ltd. ("Kato"), claiming breach of contract, wrongful termination, and fraud. The parties went to trial on October 18, 1993 and the jury returned a verdict in Roboserve's favor on all counts, awarding it compensatory and punitive damages totalling $9,950,000. Subsequently, Kato filed a mo-

tion for judgment as a matter of law or, in the alternative, for a new trial or a remittitur. The district court agreed with Kato on certain technical points and granted a remittitur of $127,500, but otherwise upheld the jury's verdict. On appeal Kato challenges the verdict and damages award as utterly contrary to the evidence. We affirm the jury's findings of breach of contract, wrongful termination, and fraud, but vacate the award of damages for breach of contract and fraud (including punitive damages) and remand for a new trial on those issues unless Roboserve accepts a substantial remittitur.

I. Background [1]

Roboserve, a Delaware corporation, leases and services hotel minibars. Kato, a Japanese company, owns the Hyatt Regency Chicago ("HRC"). The HRC is managed by Hyatt Corporation ("Hyatt"), a corporate entity separate from Kato. On June 23, 1986, Roboserve and Hyatt entered into a Concession Agreement ("Agreement") providing that Roboserve would install 1000 of its "Robobar" minibars in HRC rooms. The Agreement also required the HRC to use "reasonable endeavors" to place those guests most likely to use minibars in the Robobar rooms and to encourage them to make purchases from the minibars.[2] The system was to be installed by the end of 1986, and the Agreement was to be effective for five years, beginning with the time 25% of the Robobars were installed.

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[1] We adopt the district court's rendition of the facts, the necessary parts of which are repeated here. *See Roboserve, Inc. v. Kato Kagaku Co., Ltd.*, 873 F.Supp. 1124, 1126-27 (N.D. Ill. 1995).

[2] Section 8(1)(n) of the Agreement required Hyatt to "use reasonable endeavors to procure that rooms in which RoboBar Units are operating are first let to guests who are best able to use the facilities thereby offered and in priority to any rooms at the Location in which no such unit is operating." Section 9(3) required Hyatt to "use . . . reasonable endeavors to encourage the purchase of merchandise from the RoboBar Units at the Location . . ."

According to Roboserve, due to delays in installation, Roboserve and Hyatt negotiated an amended Agreement on October 2, 1986. The amended version altered the Agreement's duration, making it last five years from "the date when *all* the Robobar units have been commissioned," meaning installed. (Emphasis added.) Kato vigorously denies the Agreement was ever amended.

Between February and April 1987, Roboserve installed 900 of the 1000 units called for in the Agreement. Hyatt officials then decided to review the success of the Robobar program before proceeding with further installations in the HRC or other Hyatt hotels. At the time Roboserve was hoping to secure a nationwide contract with Hyatt, so it was less than insistent about enforcing its contractual right to install the remaining 100 bars.

Despite Hyatt's commitment to promote Robobars, Roboserve learned in late 1987 and early 1988 that Hyatt intended to contract with ServiSystems, a Roboserve competitor, to install in HRC's east tower a number of "ServiBars," ServiSystems' minibars. (The Robobars were to remain in the west tower.) A November 11, 1988 letter to Roboserve from Hyatt vice president David Zadikoff explained this as a test "to evaluate the two Honor Bar systems that are presently being utilized in our hotels—Robobar and ServiBar." Mr. Zadikoff assured Roboserve that Hyatt's agreement with ServiSystems was for "a one-year test period only." According to Roboserve, Hyatt representatives also indicated orally that the winner of the test would become the preferred minibar provider for Hyatt hotels and would "get the Hyatt business." By the time the November 11 letter was sent, Kato had purchased the HRC and designated Hyatt as its manager.[3]

Roboserve won the one-year test and soon thereafter began protracted negotiations with Hyatt about replacing

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[3] On August 12, 1988, Kato acquired the HRC, and on October 18, 1988, Kato assumed the prior owner's management agreement designating Hyatt as the HRC's manager.

the ServiBars in the HRC with Robobars. However, the evidence suggests (and the jury ultimately believed) that the one-year test was a pretext. Unbeknownst to Roboserve, by the time Hyatt announced the test it had already signed a contract with ServiSystems to provide ServiBars for the HRC "for a term commencing on May 15, 1988 and expiring on May 14, 1995." During the negotiations, Hyatt's official position was that Roboserve was the prefered provider of minibars, which Roboserve claims caused it to fully anticipate getting the broader Hyatt business and thus to forego any attempt to force the installation of the remaining 100 bars at the HRC.

The negotiations dragged on for about three years. Finally, on February 26, 1992, Hyatt confessed that it had "complications of another contractual arrangement" and would be unable to replace the ServiBars with Robobars. On December 14, 1992, Hyatt informed Roboserve that, as of March 1, 1993, it was terminating the Agreement.

Roboserve sued Kato alleging that Kato, through its agent Hyatt, (1) breached the Agreement by not allowing the installation of all 1000 bars and by failing to properly promote the Robobars, (2) wrongfully terminated the contract before its five-year term had begun, and (3) defrauded Roboserve of further Hyatt business. (At oral argument counsel for Roboserve stated that because Hyatt was Kato's agent, they "did not have to" sue Hyatt.) Roboserve claimed that as a result it suffered $1 million in damages from the breach of contract and another $1 million on account of the fraud (the wrongful termination count merely asked for specific performance). The prayer for relief then requested $4 million in actual and consequential damages and $2 million in punitive damages. The jury did not stop there, however. Not only did it find for Roboserve on each count, it also awarded nearly $10 million in damages: $2.1 million for the breach of contract, $850,000 for the wrongful termination (reduced by

the court to $722,500), and $7 million for fraud ($1 million in compensatory and $6 million in punitive damages).

II. Analysis

On appeal, Kato challenges both the finding of liability and the amount of the damages award for each claim. Regarding the fraud claim, Kato contends that the district court improperly permitted the jury to hear evidence suggesting that Hyatt fraudulently promised Roboserve business opportunities beyond the HRC. According to Kato, this caused the jury to believe that Kato was responsible for actions of Hyatt which were well beyond the scope of the Kato-Hyatt agency relationship. Kato challenges the award of $1 million in damages for fraud on the ground that the jury improperly based its calculations on the value of Hyatt's unfulfilled promises of business beyond the HRC, which Kato never had the means to deliver. Kato also denies the evidence suggests conduct sufficiently gross or outrageous to justify the award of any punitive damages, let alone $6 million.

As for the contract claim, Kato argues that the Agreement's "reasonable endeavors" clause was too vague to be enforceable and that the district court improperly excluded evidence that Roboserve waived its right to install all 1000 Robobars. With respect to the $2.1 million award for contract damages, Kato contends that the jury improperly compensated Roboserve for lost profits to which it was never entitled.

Finally, Kato challenges the verdict on the wrongful termination claim by arguing that the Agreement was never amended and that, at any rate, it was never truly terminated. Kato challenges the damages award (like that for breach of contract) on the ground that it was based on calculations of lost profits to which Roboserve was never entitled.

A. Fraud

1. Scope of Kato's liability for Hyatt's acts.

Initially, we consider Kato's contention that the district court improperly allowed the jury to consider as evidence of fraud centain promises Hyatt allegedly made to Roboserve concerning business at other Hyatt hotels. Such promises, Kato argues, were well beyond the scope of the Kato-Hyatt agency relationship, which was limited to the management of the HRC.[4] As a result, the jury heard evidence that Roboserve lost a large volume of business Kato was never in a position to deliver and awarded damages accordingly. Roboserve counters that Kato's HRC directly benefitted from Hyatt's ability to extract concessions favorable to Kato through alluring allusions to other Hyatt business opportunities.

Kato is correct that it cannot be held liable for Hyatt's statements to Roboserve concerning deals at other Hyatt hotels. The scope of Hyatt's agency relationship with Kato simply did not extend beyond the management of the HRC. Moreover, as a sophisticated player in the hotel industry, Roboserve knew (or should have known) that Kato could not deliver business at hotels it did not own. The evidence indicates that Roboserve courted Hyatt not merely as Kato's agent for the HRC but as a separate corporate entity, as the gatekeeper for business at Hyatt hotels nationwide. Therefore, to the extent it was wrongfully deprived of the broader Hyatt business, Roboserve's gripe is with Hyatt, not Kato. The district court came to

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[4] There seems to be no question that Kato can be held liable for Hyatt's actions taken on behalf of the HRC. It is well established under Illinois law that a principal can be held vicariously liable for the acts (including gross fraud) of its managerial agents. *Mattyasovszky v. West Towns Bus Co.*, 330 N.E.2d 509, 512 (Ill. 1975). Since Kato admits that Hyatt manages the HRC, it necessarily concedes that it is potentially liable (for compensatory and punitive damages) for Hyatt's actions in relation to the HRC. We agree with the district court's thorough analysis of the agency issue. *Roboserve, Inc.*, 873 F.Supp. at 1134-35.

this conclusion in ruling on Kato's post-trial motion, holding that "Roboserve cannot place at Kato's feet liability for fraud that extended beyond its domain, certainly not the value of all leverageable business beyond its domain." *Roboserve, Inc.*, 873 F.Supp. at 1135. The court then ruled that "to the extent that the jury found Kato vicariously liable for Hyatt's fraud beyond the HRC, we grant Kato's motion for judgment as a matter of law." *Id.* However, the district court assumed that the jury had also reached the same conclusion and had "discounted the award by an appropriate amount." *Id.* at 1142. Thus, the district court permitted the jury's award to stand.

Kato's contention remains, then, that evidence of Hyatt's conduct for which Kato was not liable was improperly admitted at trial. This court reviews claims that evidence was improperly admitted under an abuse of discretion standard, "giving the judge great deference." *Littlefield v. Mcguffey*, 954 F.2d 1337, 1342 (7th Cir. 1992). The "relevant inquiry" is "whether any reasonable person could agree with the district court." *Id.*

Although the trial judge could have been more restrictive, we find no abuse of discretion in admitting evidence of those Hyatt dealings that extended beyond the HRC. Roboserve's theory of recovery on the fraud count depended upon showing that Hyatt, acting as Kato's agent, improperly used promises of future Hyatt business, not only at the HRC but also at other hotels, to extract concessions from Roboserve that were beneficial to Kato. It would have been more difficult for the jury to get the entire picture of this complex transaction without evidence of all the negotiations and maneuverings. As we hold below, the district court's error was not in allowing the jury to hear such evidence but in failing to reduce the jury's unfounded award of damages.

2. Liability.

Kato's challenge to the jury's fraud verdict faces a formidable hurdle in the established standard of review. Under Illinois law, we may overturn the verdict only if "all of the evidence, when viewed in its aspect most favorable to [Roboserve], so overwhelmingly favors [Kato] that no contrary verdict based on that evidence could ever stand." *Commercial Credit Equipment Corp. v. Stamps*, 920 F.2d 1361, 1365 (7th Cir. 1990). We cannot, as Kato seems to implore, reweigh the evidence; we cannot disturb a verdict merely because we happen to view the evidence differently than did the jury.

After a review of the record, we find that there is sufficient evidence for a reasonable jury to have found that Roboserve was induced by the diversionary one-year test to forego its contractual rights in the hopes of receiving additional HRC business. Because of this, and the additional reasons elaborated in the district court's opinion, we hold that Kato is not entitled to judgment as a matter of law on the question of liability for fraud. *Roboserve, Inc.*, 873 F.Supp. at 1133-34.

3. Compensatory damages.

The jury's award of $1 million in compensatory and $6 million in punitive damages is another matter. Compensatory damages for fraud are intended to compensate for "any injury which is the direct and natural consequence of [the plaintiff's] acting on the faith of defendant's representations." *Gold v. Dubish*, 549 N.E.2d 660, 666 (Ill. App. Ct. 1989). Therefore, " 'out-of-pocket' losses" are "recoverable if proved at trial, for they certainly flow directly from plaintiff's having acted on defendant's representations." *Id.* at 666-67. Such losses would naturally include attorneys fees and reasonable compensation for the time and effort wasted in reliance upon misrepresentations.

By contrast, so-called "benefit-of-the-bargain" damages (as were awarded here) are available only under much narrower circumstances. The Restatement (Second) of Torts § 549(2) (1977) provides that:

> the recipient of a fraudulent misrepresentation in a business transaction is also entitled to recover additional damages sufficient to give him the benefit of his contract with the maker, if these damages are proved with reasonable centainty.

Illinois, whose law we apply in this matter, has apparently adopted this standard. *See, e.g., Gold*, 549 N.E.2d at 666-67; *Application of Busse*, 464 N.E.2d 651, 656 (Ill. App. Ct. 1984). Proof of injury resulting from the alleged fraud is an essential element in an action for fraud. *Id.* at 655. However, benefit-of-the-bargain damages are limited to "situations where the transaction between the parties has actually been consummated based on the fraudulent misrepresentation." *Id.* at 667; *see Beaton & Associates, Ltd. v. Joslyn Manufacturing & Supply Co.*, 512 N.E.2d 1286, 1292 (Ill. 1987) (court affirms the availability of benefit-of-the-bargain damages, stating that "[o]ne induced to *contract* through the fraud of another may elect to rescind the *contract* and recover the consideration paid, or affirm the *contract* and recover the difference between the property received and what he or she would have received but for the fraud") (emphasis added); Restatement (Second) of Torts § 549, Comment on Subsection (2) (1977). Where a misrepresentation induced the victim to consummate the bargain, benefit-of-the-bargain damages are appropriate to give the victim the rewards he reasonably expected under the contract. Such damages are clearly not appropriate, however, in the absence of an actual, binding agreement. Damages for common law fraud are not intended to restore what one never had.

Here, Roboserve is entitled to recover for those out-of-pocket losses attributable to Kato's misrepresentations, including the loss of its time and resources in preparing

proposals for adding new Robobars to the HRC. Testimony at trial indicated that Roboserve incurred $12,810 in attorney's fees and costs. We believe the evidence also indicates that officials at Roboserve, independent of its attorney, expended a substantial amount of time and effort preparing for and conducting negotiations with Hyatt, for which Roboserve deserves compensation. We assume the jury took this into account when calculating the damages and, in addition to the $12,810 in attorney's fees, awarded Roboserve $25,000 in out-of-pocket losses for the wasted time and effort of its employees.

The jury's $1 million verdict, however, went far beyond compensation for Roboserve's out-of-pocket losses. It obviously included benefit-of-the-bargain damages. But what bargain? There was a misleading contest that could have resulted in a contract for the winner. There were hints of Hyatt placing Robobars in a number of other hotels throughout the country. But this alleged fraud did not induce any contract. Yet, in his jury instructions on the fraud count, the judge stated that "[p]laintiff's compensatory damages may include the benefit of its bargain, which means that the plaintiff is entitled to be placed in the same financial position as it would have been in had the misrepresentations in fact been true." Under these facts, that instruction was wrong. Roboserve is not entitled to recover for the loss of contractual benefits it never actually secured. Nothing indicates that Roboserve ever consummated a deal giving it the right to additional HRC business, much less the broader Hyatt business. Roboserve does not even contend that Hyatt's misrepresentations gave rise to an enforceable contract obliging Hyatt to install additional Robobars in the HRC and beyond, and the evidence does not appear to support such a contract. The most that has been shown is that through a misleading "contest" and "negotiations" that were designed to delay, Hyatt wasted Roboserve's time and efforts, induced it not to enforce its existing contractual right to install 100 more minibars, and unjustly raised its expecta-

sions of future business and profits. However objectionable, such mistreatment does not entitle Roboserve to damages for what might have been had it actually consummated a broader agreement with Hyatt. Even if Hyatt had acted in good faith (before and after Kato came along) the negotiations still may not have resulted in the contracts Roboserve sought. Thus there was no basis for an award of benefit-of-the-bargain damages.

Based on a jury instruction that did not conform with Illinois law, the jury's award of $1 million in compensatory damages for fraud is both "monstrously excessive" and "not rationally connected to the evidence" and thus "may be altered" by this court. *Pincus v. Pabst Brewing Co.*, 893 F.2d 1544, 1554 (7th Cir. 1990) ("Because fixing a damage award is an exercise in fact-finding, only those awards that are monstrously excessive, born of passion and prejudice, or not rationally connected to the evidence may be altered."). It obviously included far more than compensation for lost time and effort—i.e., actual losses—due to the fraud. We find, therefore, that had the jury been instructed as to the proper formulation for determining compensatory damages, it would have limited its award to expenses and attorney's fees. Such an award would have amounted to no more than $37,810.

4. Punitive damages.

In its post-trial motion for judgment as a matter of law, Kato assailed the jury's $6 million punitive damages award as unwarranted and excessive. The district court reviewed its own decision to submit the question of punitive damages to the jury under an abuse of discretion standard. Given "Roboserve's supported allegation of a multi-year cover-up," the court found "evidence of a pattern of conduct sufficient to state a legally cognizable claim for punitive damages" and so held that it did not abuse its discretion when it allowed the issue to go to the jury. *Roboserve, Inc.*, 873 F.Supp. at 1136. The dis-

trict court also held that the amount of punitive damages awarded was not excessive as a matter of law under the three-factored analysis explicated by this court in *Hardin, Rodriguez & Boivin v. Paradign Ins. Co.*, 962 F.2d 62?, 640 (7th Cir. 1992).[5] *Roboserve, Inc.*, 873 F.Supp. at 1142-43. On appeal, Kato renews its objections to the punitive damages award.

"A federal court sitting in diversity looks to the law of the state, [here] Illinois, in determining the appropriateness of punitive damages." *Europlast Ltd. v. Oak Switch Systems, Inc.*, 10 F.3d 1266, 1276 (7th Cir. 1993); *see West v. Western Cas. and Sur. Co.*, 846 F.2d 387, 399 & n.6 (7th Cir. 1988) (punitive damages examined under both federal and state law); *but cf. Pincus*, 893 F.2d at 1554 ("Federal courts are to apply a federal standard when determining whether a jury verdict is excessive, though our cases recognize the value of reference to state standards where precedent exists."). "Illinois courts do not favor punitive damages and insist that plaintiffs must establish 'not only simple fraud but gross fraud, breach of trust, or other extraordinary or exceptional circumstances clearly showing malice or willfulness.'" *Europlast*, 10 F.3d at 1276, quoting *AM-PAT/Midwest, Inc. v. Illinois Tool Works, Inc.*, 896 F.2d 1035, 1043 (7th Cir. 1990) (internal quotation marks omitted); *Cornell v. Langland*, 440 N.E.2d 985, 987 (Ill. App. Ct. 1982) (punitive damages are appropriate when conduct is "intentional, deliberate and outrageous"). The Illinois Supreme Court has noted that "[b]ecause of their penal nature, punitive damages are not favored in the law, and courts must be cautious in seeing that they are not improperly or unwisely awarded." *Deal v. Byford*, 537 N.E.2d 267, 272 (Ill. 1989). As explained in *Cornell*, "[t]he awarding of puni-

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[5] In *Hardin* we explained that "Illinois courts look to three factors in analyzing [the excessiveness of punitive damages]: (1) the nature and enormity of the wrong, (2) the financial status of the defendant, and (3) the potential liability of the defendant resulting from multiple claims." *Id.*

tive damages originated as a means of punishing defendants in instances of malice, oppression or gross fraud, *i.e.*, where the manner of performance made the conduct outrageous." *Cornell*, 440 N.E.2d at 987. To justify punitive damages, the allegedly outrageous conduct must "involv[e] some element of outrage similar to that usually found in a crime." Restatement (Second) of Torts § 908, comment b (1979); *Loitz v. Remington Arms Co., Inc.*, 563 N.E.2d 397, 402 (Ill. 1990).

Under Illinois law, "the preliminary question of whether the facts of a particular case justify the imposition of punitive damages is properly one of law." *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 359 (Ill. 1978); *Cornell*, 440 N.E.2d at 987; *Europlast*, 10 F.3d at 1276. If there has been no showing of gross fraud or some exceptional circumstance clearly indicating malice or willfulness—if the evidence demonstrates only a garden variety fraud—then the question of punitive damages should not go to the jury. *See Home Sav. & Loan Ass'n of Joliet v. Schneider*, 483 N.E.2d 1225, 1228 (Ill. 1985) ("deceit alone cannot support a punitive damage award").

There is some ambiguity in Illinois law concerning the standard an appellate court should apply when reviewing a trial court's decision to submit the issue of punitive damages to the jury. As noted, the district court held that the question was within its discretion, which implies that our review on appeal is limited to finding an abuse of discretion. That position was taken by the Appellate Court of Illinois in *Motsch v. Pine Roofing Co.*, 533 N.E.2d 1, 6 (Ill. App. Ct. 1988), which held that whether punitive damages are justified is a question of law, but also "where a plaintiff's factual allegations are sufficient to state a legally cognizable claim for punitive damages, the trial court has discretion to submit the issue to the jury, and the court's determination will not be disturbed absent an abuse of that discretion." *See AMPAT/Midwest, Inc. v.*

Illinois Tool Works Inc., 896 F.2d 1035, 1044 (7th Cir. 1990) (quoting *Motsch*), and *Roboserve, Inc.*, 873 F. Supp. at 1136 (quoting *Motsch* and *AMPAT/Midwest*).

The *Motsch* position is contradicted by more recent Illinois cases. As we explained in *Williams v. Jader Fuel Co.*, 944 F.2d 1388, 1396-97 (7th Cir. 1991), "in *Loitz* however, the Illinois Supreme Court hinted that appellate courts should apply the same standard in reviewing directed verdicts concerning punitive damages as do trial courts"—that is, *de novo* review.

> Though reversing decisions by the trial and appellate courts allowing the jury to consider the question of punitive damages, the Illinois Supreme Court noted that *it*—not the trial court—reached this conclusion despite "[v]iewing the record in the light most favorable to the plaintiff." [*Loitz*, 563 N.E.2d at 407]. [Moreover, the Illinois Supreme Court] supported this proposition with a citation to *Pedrick v. Peoria & E. R.R. Co.* [229 N.E.2d 504 (1967)], perhaps the leading Illinois case concerning the standard to be applied in deciding motions for directed verdicts. *Loitz*, [563 N.E.2d at 407].

Williams, 944 F.2d at 1396. These observations led us to conclude that "decisions on directed verdicts concerning punitive damages counts are *not* exceptions to the usual Illinois rule that trial court decisions granting or denying directed verdicts are reviewed *de novo*." *Id.* at 1396-97 (emphasis added). We again confirmed this understanding in *Europlast*, 10 F.3d at 1276 ("We review the district court's submission of punitive damages to the jury *de novo*.").

The Illinois Supreme Court's recent analysis in *Martin v. Heinold Commodities, Inc.*, 643 N.E.2d 734 (Ill. 1994), bolsters our conclusions in *Williams* and *Europlast*. In *Martin*, the appellate court reversed the trial court's award of punitive damages because it found no

malice or reckless indifference towards plaintiffs' rights. *Id.* at 756-57. On appeal to the Illinois Supreme Court, plaintiffs argued that "the appellate court erred because the decision to award punitive damages is within the discretion of the trial court and such decision will not be disturbed on appeal unless it is against the manifest weight of the evidence." *Id.* at 757. The defendant countered that "the correct standard of review is whether the evidence supports the award of punitive damages." *Id.* After quoting from its holding in *Kelsay* that "the preliminary question of whether the facts of a particular case justify the imposition of punitive damages is properly one of law [384 N.E.2d at 359]," the *Martin* court went on to review the evidence and hold "that the facts of this case justify a claim for punitive damages." *Martin*, 643 N.E.2d at 757.[6]

The Illinois Supreme Court's decisions in *Loitz* and *Martin* confirm that the appellate courts in Illinois continue to review *de novo* trial court decisions to submit the issue of punitive damages to the jury. Therefore, consistent with our holdings in *Williams* and *Europlast*, we review the district court's submission of punitive damages to the jury *de novo*.

A review of the record does not reveal evidence of "gross," "wanton" or "malicious" conduct on the part of Hyatt or Kato. Rather than evidence of outrageous conduct, what emerges from a review of the facts is a picture of a highly competitive marketplace with sophisticated advocates on all sides jockeying for position and profit. Hyatt indeed played loose with its contractual obligations and was less than candid—and may even have lied—about its present actions and future plans. Yet despite the district court's ominous characterization of Kato's conduct as a "multi-year cover-up," *Roboserve, Inc.*, 873 F.Supp. at 1136, we find in the record little more

[6] The court next found that "the trial court's award of punitive damages was not against the manifest weight of the evidence." *Id.*

than simple deceit and obfuscation. For this Kato will pay a significant price, as shown in our analysis of the fraud, breach of contract, and wrongful termination issues.

But "deceit alone cannot support a punitive damage award." *Schneider*, 483 N.E.2d at 1228. That is especially so in a case like this, where the plaintiff had its own stratagems, including refraining for years from enforcing its contractual rights in the hope of landing a lucrative nationwide contract. What the record lacks is some indication that Hyatt or Kato intended to financially damage Roboserve. Wihout such evidence, the malice, wantonness or grossness that should characterize conduct justifying punitive damages is absent. *See Logsdon v. Graham Ford Co.*, 376 N.E.2d 1333, 1335 (Ohio 1978) ("[E]xemplary [i.e., punitive] damages may properly be awarded where the plaintiff has suffered actual damages as a result of fraud *intentionally committed with the purpose of injuring him.*") (emphasis added); *Black's Law Dictionary* (6th Edition), "Malice": "The intentional doing of a wrongful act without just cause or excuse, *with an intent to inflict an injury* or under circumstances that the law will imply an evil intent." (Emphasis added.) Given the strong aversion of the Illinois courts toward punitive damages, we hold that a plaintiff seeking punitive damages under these circumstances must at least put forth some evidence of intent to injure; merely withdrawing business opportunities is not enough. *See Froud v. Celotext Corp.*, 437 N.E.2d 910, 915 (Ill. App. Ct. 1982), *rev'd*, 456 N.E.2d 131 (Ill. 1983), (Illinois jury instruction defines willful and wanton misconduct justifying punitive damages as "a course of action which shows actual or deliberate *intention to harm* or which, if not intentional, shows an utter indifference to or conscious disregard of a person's own safety and the safety of others.") (emphasis added); *Peterson v. Culver Educational Foundation*, 402 N.E.2d 488, 456 (Ind. Ct. App. 1980) (Conduct meriting punitive damages is char-

acterized by a "consciousness of intended or probable effect calculated to unlawfully injure the personal safety or property rights of others. In some instances it may consist of the conscious desire to maximize rather than mitigate the amount of injury suffered. If one were to select a single word or term to describe this essence, it would be 'malice.' "); *Treadwell Ford, Inc. v. Lewis*, 416 So.2d 410, 417 (Ala. 1982) (Torbert, C.J., dissenting) ("The rule [in Alabama] is and always has been 'that punitive damages may not be recovered in such an action (deceit) unless the fraud is gross, malicious, oppressive and is committed with an intention to so injure and defraud.' *Treadwell Ford, Inc. v. Leek*, 133 So.2d 24 (Ala. 1961)."). To hold otherwise in this context would impermissibly obscure the distinction between fraud and gross fraud, between conduct meriting (ordinary) compensatory damages and conduct meriting (extraordinary) punitive damages.

Accordingly, since we can find no evidence of an intent to injure constituting gross misconduct or malicious behavior, we hold as a matter of law that the question of punitive damages in this case should not have been submitted to the jury. *See Europlast*, 10 F.3d at 1276 (punitive damages award overturned on appeal because there was "little if any evidence of 'gross,' 'wanton' or 'malicious' conduct on the part" of the defendant). The compensatory damages Roboserve will take home from this action will sufficiently redress its actual losses. Without malicious conduct and intent to harm, Roboserve is not due additional sums for the fraud and deceit Kato committed.

B. Breach of Contract

1. Liability.

Kato attacks the verdict on the breach of contract count by arguing that the trial court erred in refusing to allow the jury to consider evidence in support of its affirmative

defenses of waiver, failure to mitigate and estoppel. It further contends that the "reasonable endeavors" clause in the Agreement was too vague to be enforceable and thus could not be the basis for liability.

We find no error in the district court's ruling in regard to Kato's proposed affirmative defenses. The Agreement contained an explicit non-waiver provision that could only be overcome through a separate written agreement signed by both parties.[7] Kato does not allege the existence of a written and signed waiver supporting its position, only that Roboserve's conduct (i.e., its failure to enforce its rights) relieves Kato from the strict terms of the non-waiver clause.

As the district court correctly noted, non-waiver "clauses are enforceable [in] Illinois," *Monarch Coaches, Inc. v. ITT Industrial Credit*, 818 F.2d 11, 13 (7th Cir. 1987), and may be strictly construed even when full compliance with the contract has not been required for a lengthy period of time. *See, e.g., Transcraft Corp. v. Anna Indus. Dev. Corp.*, 584 N.E.2d 1033, 1035 (Ill. App. Ct. 1991) (non-waiver clause still binding though contract breached continuously for over twenty years). Nevertheless, it is still possible to waive such a clause. As we noted in *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 776 F.2d 198, 202 (7th Cir. 1985), "the weight of authority in Illinois holds that Waiver Only in Writing pro-

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[7] Section 19 of the Agreement provides: "The rights and remedies of the parties shall not be diminished waived or extinguished by the granting by one party of any indulgence forbearance or extension of time to the other party nor by any failure or delay by a party in asserting or exercising such rights or remedies." This clause is not iron-clad, however, for it is modified by section 26, which provides: "This Agreement and any other matters agreed in writing between the parties hereto in relation to the subject matter of this Agreement shall constitute the entire agreement between [Roboserve] and the [HRC] in relation to such subject matter and no variation to the same shall be binding on [Roboserve] unless in writing and signed by both parties."

visions can be waived by [the] words and deeds of the parties, so long as the waiver is proved by clear and convincing evidence." Kato does not present such convincing evidence, and for this reason, and the additional reasons outlined in the district court's opinion, we hold that the non-waiver clause was fully enforceable. *See Roboserve, Inc.*, 873 F.Supp. at 1129-30. Therefore, the district court properly excluded Kato's evidence of waiver Further, since the estoppel and mitigation defenses were nothing more than disguised claims of waiver, the district court was also correct to exclude evidence of these affirmative defenses. *Id.*

Kato's complaints about the vagueness of the clause in the Agreement requiring it to use "reasonable endeavors" to promote Roboserve's bars are also unpersuasive. The clause may be somewhat vague, but it still has meaning. "Reasonable efforts" clauses are enforceable in Illinois. The question of what is "reasonable" under a contract is an issue of fact for the trier of fact. *See Honkomp v. Dixon*, 422 N.E.2d 949, 951 (Ill. App. Ct. 1981) ("Questions of reasonableness and good faith are generally issues of fact, entrusted for resolution to the trier of fact."). The evidence demonstrates that Kato could have placed Robobars in the more upscale Gold Passport rooms, but it did not. Kato also could have informed its guests of the Robobars and given them brief instructions as to their use, but it did not. At the very least, Kato could have refrained from establishing and promoting a competing product line within the HRC itself, but it did not. By agreeing to this provision, Kato was committed to a number of "endeavors" that it did not perform but that Roboserve (and the jury) could have considered reasonable. Whatever the precise affirmative duties of one bound to use "reasonable endeavors" to promote a product, the jury could reasonably have found that Kato had not complied. There is no reversible error in the jury's finding that Kato breached the contract.

2. *Damages.*

Once again, however, we are forced to conclude that the amount of the jury's award of damages cannot be upheld. Of course, the "fixing of a damage award is an exercise in fact-finding" which should not lightly be disturbed on appeal. *Pincus,* 893 F.2d at 1554. But where an award of contract damages is "irrationally disproportionate" to the actual harm suffered—where a jury award leaves a party "in a dramatically better position than his rational expectations could have justified"—we are obliged to make appropriate corrections. *See id.* Such is the case here.

"Damages recoverable under a breach of contract theory are based upon the mutual expectations of the parties. The basic principle for the measurement of contract damages is that the injured party is entitled to recover an amount that will put him in as good a position as he would have been in had the contract been performed as agreed." *Collins v. Reynard,* 607 N.E.2d 1185, 1186 (Ill. 1992); *Ollivier v. Alden,* 634 N.E.2d 418, 422 (Ill. App. Ct. 1994) (in determining contract damages, "it is fundamental that a monetary award should, to the extent possible, put the nonbreaching party in the position he would have been in had the contract been performed.") "However, a plaintiff is not entitled to a windfall." *Id.* at 423; *Gaiser v. Village of Skokie,* 648 N.E.2d 205, 213 (Ill. App. Ct. 1995) ("The general rule of contract damages is that the person who is injured is to be placed in the position he would have been in had the contract been performed, *but not in a better position.*") (emphasis added). Therefore, Roboserve was entitled to contract damages in an amount equivalent to the difference between the benefits it actually received and those to which it was due under the Agreement—but no more.

In a pretrial motion *in limine,* Kato reiterated these fundamental maxims of contract damages and requested the court to exclude as irrelevant evidence relating to ServiSystem's profits. Kato argued that in the event a breach

was found, Roboserve was entitled only to the profits it would have received had the contract been properly honored but not to revenues generated by the ServiBars.

The district court was not persuaded, however, and at trial the jury was permitted to hear testimony from Roboserve's expert that, between 1988 and 1993, $2,343,744 in ServiBar sales should have gone to Roboserve. The expert testified that the HRC contained 1870 in-room bars (900 Robobars and 970 ServiBars) and that of these "no more than 600" would be used on any given day. Since there were 900 Robobars in the HRC, and since there should have been 1000 under the contract, the expert continued, all of the 600 daily bar uses could have (and, under the contract, should have) occurred at Robobars. Therefore, had the contract been fully honored, all of the ServiBar sales would have gone to Robobars. The expert then explained how he took the estimated total revenues from those sales, adjusted for taxes, reduced the amount by 50% (the revenue sharing formula provided for in the Agreement), subtracted out maintenance costs, and added the interest specified in the Agreement for past-due payments. These calculations yielded an amount of $2,343,744, which the expert concluded was the total injury Roboserve suffered from Kato's breach of contract.

The jury was clearly persuaded by these numbers, awarding Roboserve $2.1 million in contract damages.[8] Yet a review of the numbers and the assumptions Roboserve's expert used confirms that the award cannot stand. The Agreement obligated Kato to install 1000 Robobars and to use "reasonable endeavors" to promote them. Roboserve's expert testified that of the total number of minibars installed by Roboserve and ServiBar, there were never more than 600 total uses each day in the HRC—a daily usage rate of approximately 32.1% (600 uses di-

[8] Kato's failure to put on an expert witness of its own bolsters our conclusion that the jury relied on the figures presented by Roboserve's expert witness in calculating the contract damages.

vided by 1870 total bars). The expert confirmed that this usage rate was more or less consistent with general usage rates of in-room bars nationally. Even had Kato done everything possible to promote 1000 Robobars, we cannot find any evidence whatsoever that Robobar usage could have been too much more than 30%. The jury evidently accepted the assumption of Roboserve's expert that the sales from all 600 daily bar uses could have been captured by 1000 rooms that should have had Robobars. But that assumption has no factual foundation. There is no evidence in the record suggesting that the "reasonable endeavors" Kato was required to use in promoting Robobars could have raised the bar-usage rate from an HRC *maximum* (according to Roboserve's expert) of 32.1% to 60% (600 to 1000). Moreover, the jury's award for lost profits due to six years of partial performance of the contract was almost two and a half times what it awarded for the wrongful termination—$2,100,000 versus $850,000. In other words, the jury concluded that the value of five years of lost profits from a *total* breach—a termination —of the contract amounted to only 40% of what it determined Roboserve had lost over a six year perior from a mere *partial* breach of the contract. Such a conclusion is obviously irrational and finds no supoprt in the record.

Determining the proper amount of damages in this case is somewhat of a mathematical challenge. To note just one deficiency, missing from the record on appeal is a precise indication of Roboserve's per-unit profits, an essential figure for calculating appropriate compensation. Nevertheless, the numbers in the record do suggest a more reasonable, if still generous, damages award.

We have established that 900 of the 1000 Robobars were installed in the HRC but not properly promoted. Roboserve is therefore entitled to the profits it would have had if all 1000 Robobars had been installed and properly promoted as required by the Agreement. Roboserve's expert witness estimated that between 1988 and 1993

ServiSystem had $2,343,744 in sales that would otherwise have gone to Roboserve. In other words, he estimated that the contractual value *to Roboserve* of lost ServiBar sales amounted to $2,343,744. Working backwards we can calculate the per-use profit of each minibar. ServiBars were present in 970 rooms in the HRC. If we assume an average occupancy rate of 70%, then on average 679 (970 × .70) rooms with ServiBars were occupied each day. With 32.1% as the maximum usage rate for in-room bars (as Roboserve's expert testified), about 218 (679 × .321) uses of ServiBars occurred each day. This amounts to 477,420 ServiBar uses during the six years between 1988 and 1993 (218 uses per day × 365 days per year × 6 years = 477,420 uses over 6 years). Roboserve's expert estimated the value *to Roboserve* of these 477,420 ServiBar uses at $2,343,744, or $4.91 per use. He also indicated that sales per unit from the ServiBars and Robobars were basically the same. Thus we assume that the profit from a Robobar sale or use was no more than $4.91.

Using these figures derived from Roboserve's expert, we can estimate Roboserve's actual profits. With 900 Robobars installed, and again assuming a 70% occupancy rate, 630 Robobar rooms (900 × .70) would have been occupied each day at the HRC. Again assuming the 32.1% usage rate supplied by Roboserve's expert, this implies there were about 202 uses of the Robobars each day (630 × .321), 73,730 each year (202 × 365 days per year), and 442,380 over the roughly six years of the contract (73,730 × 6 years). By these calculations, we estimate that Roboserve actually made about $2,172,086 in profits between 1988 and 1993 (442,380 uses × $4.91 per usage).

We now consider what Roboserve's profits should have been under the contract. Roboserve claims, in essence, that its usage rate would have been 60% had Kato used "reasonable endeavors" to promote its bars. As noted, we

find this assertion to be without support in the record, in clear contradiction of the testimony of its own expert, and highly improbable. Nevertheless, the jury found that Kato breached the Agreement, and we have assumed this means it found Kato did not put forth appropriate efforts to promote Robobars. Accordingly, we also assume the jury determined that had Kato used "reasonable endeavors" to promote Robobars, at least some increase in Robobar sales would have occurred. Although an increase to 60% is implausible, we believe it is possible—and assume for purposes of calculating damages—that Robobar sales could have increased to as much as 40% of occupied rooms. Moreover, we assume that a proper promotion of Robobar rooms would also have increased the occupancy rate of Robobar rooms to about 75% from 70%.

Using the figures derived above and the assumptions just stated, Roboserve would have reaped $3,225,870 in profits if 40% of the guests in occupied Robobar rooms had used their Robobars.[9] The difference, therefore, between what we assume Roboserve received in profits ($2,172,086 with a 32.1% usage rate) and what it could maximally have expected under the contract ($3,225,870 with a 40% usage rate) is $1,053,784.

We acknowledge the relative imprecision of the above calculations. Since Kato chose not to offer its own estimates of Roboserve's contract losses, our calculations were necessarily limited to the numbers provided by Roboserve's expert. Where there was doubt, we have erred on the side of Roboserve in deference to its victory at trial. Thus, our estimation that Roboserve suffered $1,053,784 in losses due to Kato's breach is undoubtedly generous. What it conclusively reveals, however, is that the jury's

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[9] 1000 rooms X 75% occupancy rate = 750 occupied rooms per day X 40% usage = 300 uses per day X 365 days per year = 109,500 uses per year X 6 years = 657,000 uses over the 6 years of the contract X $4.91 per usage profit = $3,225,870 profit.

award of $2.1 million was out of all proportion to the actual injury Roboserve sustained. Roboserve was never entitled to all of ServiSystem's profits. Its damages award should have been limited to the losses it suffered due to Kato's failure to properly promote the 1000 Robobars called for in the Agreement. Using Roboserve's own estimates of per unit profits, we hold that such losses could not have been more than $1,053,784.

C. Wrongful Termination

1. Liability.

Kato contests the jury's determination that it wrongfully terminated the Agreement. Throughout, Roboserve has mainained that due to delays in installation, the original Agreement was modified so that the five-year contract period would not begin until all 1000 Robobar units had been installed. Thus, when Kato terminated the contract with only 900 Robobars installed, it actually terminated before the contract began. Hence, it became liable for five years of Roboserve's lost profits. Kato vigorously denies that the Agreement was ever amended, pointing to a clause in the Agreement requiring a writing signed by both parties for any valid modification. (See footnote 7 *supra* for the text of the Amendment Only in Writing clause.) In Kato's view, no such writing was ever effected and thus no amendment occurred, with the result that there was no wrongful termination. Kato also argues that since the Robobars remain in the HRC, its letter of December 14, 1992 terminating the Agreement was not a positive and unequivocal repudiation of the contract. In response, Roboserve contends that a signed letter from Kato affirming the amended Agreement confirms its binding authority. Alternatively, Roboserve argues that Kato waived the Amendment Only in Writing clause through its words and deeds, including terminating the Agreement only after it believed the amended Agreement was about to run its course. Lastly, Roboserve responds that the

plain language of the December 14 letter unequivocally terminated the Agreement.

The district court engaged in a thorough and extensive review of these arguments in its memorandum opinion and concluded that the parties satisfied the Amendment Only in Writing clause; that there was sufficient evidence to support the jury's finding that Kato waived that clause; that the amended Agreement satisfied the Illinois Statute of Frauds (an issue not raised on appeal); and that Kato accepted Roboserve's offer to amend within a reasonable time period. *Roboserve, Inc.*, 873 F.Supp. at 1130-33. For the reasons stated in the district court's thorough discussion, we hold that the amended Agreement governed the parties' duties. And because the amended Agreement specified that the five-year contract period would not begin until all 1000 Robobars had been installed, which to this day has not occurred, and because the December 14 letter of termination was unequivocal, we also hold that the jury's determination that Kato wrongfully terminated the Agreement was not incorrect as a matter of law.

2. Damages.

As with the other damages awards, Kato disputed the jury's award of $850,000 for wrongful termination in its post-trial motion on the ground that it was excessive and that, in any event, the jury calculated it based on an incorrect starting date. The district court denied that the award was excessive as a matter of law, but agreed with Kato that the jury had used the wrong starting date in its calculations and so remitted $127,500 of the award, reducing it to $722,500. *Id.* at 1143-44. On appeal, Kato contends that even as remitted the award was illegitimately based on ServiBar profits and thus should be further remitted by at least 50%.

In contrast to the other damages awards, we cannot say that the award of $722,500 is grossly disproportionate to

the actual injury Roboserve suffered from the wrongful termination. We held above that the facts in the record could support an award (albeit generous) of $1,053,784 for Kato's failure to honor the Agreement over a six year period. In comparison to that amount, an award of $722,500 for termination of the Agreement five years early is not clearly excessive and therefore must stand.[10]

III. Conclusion

In sum, we affirm the jury's finding of liability on the fraud, breach of contract, and wrongful termination counts, but vacate the award of damages for fraud (including punitive damages) and breach of contract and remand for a new trial on those issues unless Roboserve accepts a remittitur as specified above.

AFFIRMED IN PART,
VACATED IN PART, AND REMANDED.

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[10] Kato may have a point in claiming that Roboserve's expert presented figures inflated with Servibar proceeds. But when compared to the now-reduced award for the six-year breach of contract, the five-year contract termination award is relatively small. By not presenting competing expert testimony, Kato leaves us only with Roboserve's calculations. And their expert testified by referring to charts and documents that the jury observed but for some reason were not made part of the record. So these inflated and somewhat inconsistent figures are the result of Kato's own decisions at trial.

RIPPLE, *Circuit Judge*, concurring in part and dissenting in part.

To the extent that the majority formulates the standard for imposing punitive damages for fraud as limited to situations in which a single factor—"intent to injure"—is present, I respectfully dissent.

Read in their entirety, the decisions of the Illinois courts suggest that the presence of other aggravating circumstances, many of which do not rise to the level of an intent to injure, will justify the imposition of punitive damages for fraud. *E.g.*, *Martin v. Heinhold Commodities, Inc.*, 643 N.E.2d 734, 757 (Ill. 1994) (noting that "punitive damages are permissible where a duty based on a relationship or trust is violated and where the violation has been willful"). The cases suggest that one such aggravating circumstance is a pattern of represensible conduct of the type engaged in by Hyatt in the present case. *See Kleidon v. Rizza Chevrolet, Inc.*, 527 N.E.2d 374 (Ill. App. Ct. 1988) (punitive damages reversed where "the record does not establish a pattern of bad faith by [the defendant] during its dealings with plaintiffs"); *Four "S" Alliance, Inc. v. American Nat'l Bank & Trust Co. of Chicago*, 432 N.E.2d 1213, 1217 (Ill. App. Ct. 1982) (punitive damages upheld where misrepresentations were repeated at various stages of the negotiations and were material to plaintiffs' ongoing business decisions). Indeed, this court recognized the availability of punitive damages for such conduct in *West v. Western Casualty & Surety Company*, 846 F.2d 387 (7th Cir. 1988), where we concluded that "the jury was entitled to conclude that [defendant's] conduct was deliberate and purposeful, orchestrated by responsible management over a significant period of time." *Id.* at 398.

Although I do not join the majority's conclusion that total abrogation of punitive damages on the fraud count is appropriate, it is clear that the amount of the award must be reassessed. The jury was permitted to consider

evidence, decide issues, and award damages based on evidence of "Hyatt business" from hotels other than the HRC. The district court took the view that the jury had not awarded damages for fraud beyond the confines of the HRC, but following, as we must, the presumption that jurors follow the instructions given to them, *e.g.*, *Downes v. Volkswagen of America, Inc.*, 41 F.3d 1132, 1144 (7th Cir. 1994); *Sokol Crystal Prods., Inc. v. DSC Communications Corp.*, 15 F.3d 1427, 1433 (7th Cir. 1994), I would remand the award of punitive damages on the fraud count for redetermination.

Remand is also the appropriate course with respect to damages on Roboserve's claim for breach of contract. The majority correctly concludes that the jury's award cannot be supported by the record, but an appropriate division of responsibility between the court of appeals and the district court requires that a determination of the proper amount be conducted, in the first instance, by the trier of fact. I would, therefore, remand this issue as well.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

March 18, 1996

Before Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

No. 95-1371

ROBOSERVE, INCORPORATED
a Delaware Corporation,
Plaintiff-Appellee,
v.

KATO KAGAKU COMPANY, LIMITED,
a Japanese Company,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

No. 92 C 5248—Brian Barnett Duff, *Judge*

AMENDING ORDER

The slip opinion released on February 23, 1996 is amended as follows:

Section "4. Punitive Damages", starting in the middle of page 11 and continuing through the seventh line on page 17, is deleted, and the following language is substituted:

"*4. Punitive damages.*

In its post-trial motion for judgment as a matter of law, Kato assailed the jury's $6 million punitive damages award as unwarranted and excessive. The district court reviewed its own decision to submit the question of punitive damages to the jury under an abuse of discretion standard. Given "Roboserve's supported allegation of a multi-year cover-up," the court found "evidence of a pattern of conduct sufficient to state a legally cognizable claim for punitive damages" and so held that it did not abuse its discretion when it allowed the issue to go to the jury. *Roboserve, Inc.*, 873 F.Supp. at 1136. The district court also held that the amount of punitive damages awarded was not excessive as a matter of law under the three-factored analysis explicated by this court in *Hardin, Rodriguez & Boivin v. Paradign Ins. Co.*, 962 F.2d 628, 640 (7th Cir. 1992).[1] *Roboserve, Inc.*, 873 F.Supp. at 1142-43. On appeal, Kato renews its objections to the punitive damages award.

We review *de novo* the district court's denial of Kato's motion for judgment as a matter of law on the question of punitive damages. *Williams v. O'Leary*, 55 F.3d 320, 323 (7th Cir.), *cert. denied sub nom. Williams v. Brewer*, 116 S.Ct. 527 (1995); *cf. Europlast Ltd. v. Oak Switch Systems, Inc.*, 10 F.3d 1266, 1276 (7th Cir. 1993) ("We review the district court's submission of punitive damages to the jury *de novo*."). Reversal is appropriate if we conclude that "there is no legally sufficient evidentiary basis for a reasonable jury to find" that the Illinois criteria for imposing punitive damages were met.

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[1] In *Hardin* we explained that "Illinois courts look to three factors in analyzing [the excessiveness of punitive damages]: (1) the nature and enormity of the wrong, (2) the financial status of the defendant, and (3) the potential liability of the defendant resulting from multiple claims." *Id.*

Fed.R.Civ.P. 50(a)(1); *Thomas v. United States*, 41 F.3d 1109, 1113 (7th Cir. 1994); *cf. Mayer v. Gary Partners & Co.*, 29 F.3d 330, 334 (7th Cir. 1994) (standard for granting summary judgment in diversity cases "whether reasonable minds could deem the evidence adequate *under the governing* [*state*] *substantive rule*") (emphasis added).

"Illinois courts do not favor punitive damages and insist that plaintiffs must establish 'not only simple fraud but gross fraud, breach of trust, or other extraordinary or exceptional circumstances clearly showing malice or willfulness.'" *Europlast*, 10 F.3d at 1276 (quoting *AM-PAT/Midwest, Inc. v. Illinois Tool Works, Inc.*, 896 F.2d 1035, 1043 (7th Cir. 1990)) (internal quotation marks omitted); *Cornell v. Langland*, 440 N.E.2d 985, 987 (Ill. App. Ct. 1982) (punitive damages are appropriate when conduct is "intentional, deliberate and outrageous"). The Illinois Supreme Court has noted that "[b]ecause of their penal nature, punitive damages are not favored in the law, and courts must be cautious in seeing that they are not improperly or unwisely awarded." *Deal v. Byford*, 537 N.E.2d 267, 272 (Ill. 1989). In *Cornell* the court explained: "The awarding of punitive damages originated as a means of punishing defendants in instances of malice, oppression or gross fraud, *i.e.*, where the manner of performance made the conduct outrageous." 440 N.E.2d at 987. To justify punitive damages, the allegedly outrageous conduct must "involv[e] some element of outrage similar to that usually found in a crime." Restatement (Second) of Torts § 908, comment b (1979); *Loitz v. Remington Arms Co., Inc.*, 563 N.E.2d 397, 402 (Ill. 1990). And without evidence of gross fraud or some exceptional circumstance clearly indicating malice or willfulness—if the evidence demonstrates only a garden variety fraud—under Illinois law the question of punitive

damages is not even submitted to the jury. *See Home Sav. & Loan Ass'n of Joliet v. Schneider*, 483 N.E.2d 1225, 1228 (Ill. 1985) ("deceit alone cannot support a punitive damage award"); *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 359 (Ill. 1978) ("[T]he preliminary question of whether the facts of a particular case justify the imposition of punitive damages is properly one of law.").

Our review of the record does not reveal evidence of "gross," "wanton" or "malicious" conduct on the part of Hyatt or Kato. Rather than evidence of outrageous conduct, what emerges from a review of the facts is a picture of a highly competitive marketplace with sophisticated advocates on all sides jockeying for position and profit. Hyatt indeed played loose with its contractual obligations and was less than candid—and may even have lied—about its present actions and future plans. Yet despite the district court's ominous characterization of Kato's conduct as a "multi-year cover-up," *Roboserve, Inc.*, 873 F.Supp. at 1136, we find in the record little more than simple deceit and obfuscation. For this Kato will pay a significant price, as shown in our analysis of the fraud, breach of contract, and wrongful termination issues.

But in Illinois "deceit alone cannot support a punitive damage award." *Schneider*, 483 N.E.2d at 1228. That is especially so in a case like this, where the plaintiff had its own stratagems, including refraining for years from enforcing its contractual rights in the hope of landing a lucrative nationwide contract. What the record lacks is some indication that Hyatt or Kato intended to financially damage Roboserve. Without such evidence, the malice, wantonness or grossness that under Illinois law must characterize conduct justifying the imposition of punitive damages is absent. *See also Logsdon v.*

Graham Ford Co., 376 N.E.2d 1333, 1335 (Ohio 1978) ("[E]xemplary [i.e., punitive] damages may properly be awarded where the plaintiff has suffered actual damages as a result of fraud *intentionally committed with the purpose of injuring him.*") (emphasis added); *Black's Law Dictionary* (6th Edition), "Malice": "The intentional doing of a wrongful act without just cause or excuse, *with an intent to inflict an injury* or under circumstances that the law will imply an evil intent." (Emphasis added.) Given the strong aversion of the Illinois courts toward punitive damages, we hold that a plaintiff seeking punitive damages under these circumstances must at least put forth some evidence of intent to injure; merely withdrawing business opportunities is not enough. *See Froud v. Celotext Corp.*, 437 N.E.2d 910, 915 (Ill. App. Ct. 1982) (Illinois jury instruction defines willful and wanton misconduct justifying punitive damages as "a course of action which shows actual or deliberate *intention to harm* or which, if not intentional, shows an utter indifference to or conscious disregard of a person's own safety and the safety of others.") (emphasis added); *Peterson v. Culver Educational Foundation*, 402 N.E.2d 448, 456 (Ind. App. 1980) (Conduct meriting punitive damages is characterized by a "consciousness of intended or probable effect calculated to unlawfully injure the personal safety or property rights of others. In some instances it may consist of the conscious desire to maximize rather than mitigate the amount of injury suffered. If one were to select a single word or term to describe this essence, it would be 'malice.' "). *Treadwell Ford, Inc. v. Lewis*, 416 So.2d 410, 417 (Ala. 1982) (Torbert, C.J., dissenting) ("The rule [in Alabama] is and always has been 'that punitive damages may not be recovered in such an action (deceit) unless the fraud is gross, malicious, oppressive and is committed with an intention

to so injure and defraud.' *Treadwell Ford, Inc. v. Leek*, 133 So.2d 24 (Ala. 1961)."). To hold otherwise in this context would impermissibly obscure the distinction between fraud and gross fraud, between conduct meriting (ordinary) compensatory damages and conduct meriting (extraordinary) punitive damages.

Accordingly, since we can find no evidence of an intent to injure constituting gross misconduct or malicious behavior, we hold that the district court erred in denying Kato's motion for judgment as a matter of law on the question of punitive damages. *See Europlast*, 10 F.3d at 1276 (punitive damages award overturned on appeal because there was "little if any evidence of 'gross,' 'wanton' or 'malicious' conduct on the part" of the defendant). The compensatory damages Roboserve will take home from this action will sufficiently redress its actual losses. Without malicious conduct and intent to harm, Roboserve is not due additional sums for the fraud and deceit Kato committed.

APPENDIX B

UNITED STATES DISTRICT COURT
N.D. ILLINOIS
EASTERN DIVISION

No. 92 C 5248

ROBOSERVE, INC.,
Plaintiff,

v.

KATO KAGAKU CO., LTD., *et al.*,
Defendant.

Jan. 17, 1995

MEMORANDUM OPINION

BRIAN BARNETT DUFF, District Judge.

On August 4, 1992, Plaintiff Roboserve, Inc. ("Roboserve"), sued Defendant Kato Kagaku Co., Ltd. ("Kato"), claiming breach of contract, wrongful termination, and fraud. The parties went to trial on October 18, 1993, and the jury returned a verdict in Roboserve's favor on all counts, awarding it compensatory and punitive damages totaling $9,950,000. Subsequently, Kato filed a motion for judgment as a matter of law, or, in the alternative, for a new trial or a remittitur. We grant in part the motions for judgment as a matter of law and remittitur, and we deny the motion for new trial.

I. Background

Roboserve is a company that leases and services hotel minibars, and Kato owns the Hyatt Regency Chicago ("HRC"), a hotel in Chicago. On June 23, 1986, Roboserve and Hyatt Corporation ("Hyatt"), the HRC's manager, signed a Concession Agreement ("CA"). The CA provided, among other things, that Roboserve would install 1000 of its minibars, called RoboBars, in the HRC rooms and that the HRC would use reasonable endeavors to place guests who are the most likely to use minibars in the RoboBar rooms and, further, to encourage those guests to make purchases from the minibar.[1] On October 2, 1986, Roboserve and Hyatt negotiated an Amended CA. The amended version altered the CA's duration, making it last five years from "the date when all the RoboBar units have been commissioned," meaning installed. A Roboserve representative signed the amended CA, but a Hyatt representative did not.

Four issues arose during the implementation phase of the CA. First, between February and April 1987, Roboserve installed in the HRC's west tower only 900 of the called-for 1000 units. Second, Hyatt contracted with ServiSystems, a Roboserve competitor, to install in the east tower a number of ServiBars, the ServiSystems minibars. Third, as a result of having the second minibar system in the hotel, the HRC may not have used reasonable endeavors to ensure that it placed the "correct" people in the RoboBar rooms. Fourth, the HRC also may not have used reasonable endeavors to encourage guests to make purchases from the RoboBars.

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[1] Section 8(1)(n) of the CA provides: "[U]se reasonable endeavours to procure that rooms in which RoboBar Units are operating are first let to guests who are best able to use the facilities thereby offered and in priority to any rooms at the Location in which no such unit is operating." Section 9(3) provides: "[U]se . . . reasonable endeavours to encourage the purchase of merchandise from the RoboBar Units at the Location . . ."

Of the four issues, the one surrounding Hyatt's relationship with ServiSystems was the most complex. In late 1987, Roboserve learned of Hyatt's intention to contract with ServiSystems, and on April 22, 1988, Roboserve received a letter from Hyatt confirming its intention to "proceed with the ServiBar installation into the west tower."[2] Pl. Ex. 2. Unbeknownst to Roboserve, on May 1, 1988, Hyatt signed a contract with Servisystems to provide ServiBars for the HRC "for a term commencing on May 15, 1988 and expiring on May 14, 1995." Pl.Ex. 12. On November 11, 1988, however, after Kato acquired the HRC and confirmed Hyatt as the hotel's manager,[3] Mr. Zadikoff, one of Hyatt's vice presidents, wrote to Roboserve the following:

> As we discussed, our objective at the Hyatt Regency Chicago was to evaluate the two Honor Bar systems that are presently being utilized in our hotels—RoboBar and ServiBar. The agreement was that ServiBar would be installed in one tower of the Hyatt Regency Chicago for a one-year test period only, so that we could evaluate both sales potential and operational costs.

Pl.Ex. 3. According to Roboserve, Hyatt also communicated to it orally that the winner of the test would become the preferred minibar provider for Hyatt hotels and would "get the Hyatt business."

After Roboserve won the one-year test, Hyatt negotiated with Roboserve about replacing the ServiBars with Robobars, despite Hyatt's contract to maintain the ServiBars at the hotel through 1995. Much later, on February 26, 1992, Hyatt announced that it had "complications

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[2] As the parties made clear at trial, the ServiBars went into the east tower, not the west. Def.'s Br. at 15.

[3] On August 12, 1988, Kato acquired the HRC, and on October 18, 1988, Kato assumed the prior owner's management agreement, which provided that Hyatt would manage the hotel.

of another contractual arrangement" and would be unable to replace the ServiBars with RoboBars. Pl.Ex. 32. On December 14, 1992, Mr. Keeshin, Hyatt's Associate General Counsel, informed Roboserve that, as of March 1, 1993, Hyatt would terminate the amended CA. Pl.Ex. 196.

II. Discussion

A. Standard of Review

Kato moves for a judgment as a matter of law, or, in the alternative, for a new trial.[4] Kato's motion "is a remedy for a party who lost the verdict. He . . . contends that he is entitled to judgment as a matter of law. By the alternative motion, he asks the court to grant him a new trial if he is wrong in his contention that he is entitled to judgment." 9 Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure*, § 2539 (1971).

"As to the motion for [judgment as a matter of law], . . . we apply the Illinois rule that such a motion should be granted only if 'all of the evidence, when viewed in its aspect most favorable to the opponent [of the motion] so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand.'" *Hardin, Rodriguez & Boivin Anesthesiologists, Ltd. v. Paradigm Ins. Co.*, 962 F.2d 628, 640 (7th Cir.1992) (quoting *Schultz v. Amer. Airlines, Inc.*, 901 F.2d 621, 623 (7th Cir.1990) (quoting an Illinois Supreme Court case)).

"On motions for a new trial the federal standard applies, even in diversity cases. [citation omitted]. Under the standard, 'a new trial can be granted only when the jury's verdict is against the clear weight of the evidence.'" *Id.* (quoting *Davlan v. Otis Elevator Co.*, 816 F.2d 287, 289 (7th Cir.1987)).

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[4] Below, in the damages section, we will discuss Kato's motion for remittitur and present the applicable standard of review.

B. Breach of Contract Claim

1. Kato's Denial of Breach

First, Kato denies that it breached the CA by allowing the installation of only 900 of the called-for 1000 Robo-Bars. It claims that Roboserve installed only 900 units because Roboserve never asserted its right to install the additional 100. Kato argues that it should not now be forced to pay damages for Roboserve's failure to maximize the CA.

Roboserve maintains that Kato breached the CA. For support, it points to the testimony of Mr. Fattal, a Roboserve executive. At trial, Mr. Fattal referred to his February 20, 1987, letter to Mr. Connolly, Hyatt's Senior Vice President and General Counsel, in which he wrote: "As regards installations, the position is as follows:— . . . (iv) [the HRC]: Being installed starting 9 February, with approximately 900 bars. Should be completed during March." Pl.Ex. 41; Tr. at 93. Mr. Fattal testified that, through this letter, he informed Hyatt of the intentions of Roboserve to install the additional 100 units. Tr. at 93. Mr. Fattal claimed that Hyatt understood Roboserve's intentions and wanted to frustrate them. As evidence, he pointed to an internal memo that Mr. Connolly wrote and attached to the February 20 letter. The memo states: "Before proceeding with any further installations, I believe we should review the success (or lack thereof) of the Robobar program to date." Pl.Ex. 41.

Mr. Fattal also testified that Mr. Wood, another Roboserve employee, informed Hyatt of the intentions of Roboserve with regard to the 100 units. When Roboserve's counsel asked Mr. Fattal if he "kn[e]w if [Mr. Wood] ever discussed the hundred bars [with Mr. Connolly]", Mr. Fattal responded: "I believe so, yes, sir." Tr. at 97.

Roboserve's evidence of its intentions about the 100 minibars is unclear. Does Mr. Fattal's February 20 letter imply that Roboserve would "start[]" the installation proc-

ess with the 900 units and "complete[]" it with the remaining 100? Does the letter imply that Roboserve would start the installation process with the 900 units in "February" and complete it with the remaining 100 in "March"? Does Mr. Fattal's testimony about Mr. Wood imply that Mr. Wood told Mr. Connolly about Roboserve's intention to install the additional minibars?

Although Roboserve's evidence is unclear, for the purposes of Kato's motion we view the evidence "in its aspect most favorable to the opponent." *Hardin,* 962 F.2d at 640. Viewed in that aspect, we cannot say that the evidence "so overwhelmingly favors the movant that no contrary verdict based on [it] could ever stand." *Id.* Therefore, on this point, Kato is entitled to neither a judgment as a matter of law nor a new trial.

Second, Kato denies that it breached the CA by failing to use reasonable endeavors to place the "correct" people in the RoboBar rooms or to encourage those people to make purchases from the minibars. It claims that Roboserve produced insufficient evidence to prove that Kato breached and that, in any event, such evidence would be difficult to produce given that Hyatt could not know which hotel guest would want to use a minibar on any given night.

Roboserve maintains that it produced sufficient evidence. For example, it points to the evidence that, although Hyatt knew guests who stayed in its Gold Passport rooms would, on average, purchase more items from minibars, it allowed only ServiBars in those rooms. Tr. at 125, 569. Also, Roboserve points to the evidence that Hyatt's standard procedure for welcoming guests excluded informing them that their room contained a RoboBar. Tr. at 603-4.

Here, Roboserve's evidence is unambiguous. Kato could have allowed RoboBars in the Gold Passport rooms, but it did not. *Cf.* CA § 8(1)(n). It could have informed

guests of their RoboBars, but it did not. *Cf.* CA § 9(3). In other words, Kato knew of concrete, objective ways to promote RoboBars, but it opted against promoting them. From the evidence, it is possible to conclude that Kato did not use reasonable endeavors and that, consequently, it breached the CA. Therefore, on this point, Kato is entitled to neither a judgment as a matter of law nor a new trial.

2. Kato's Affirmative Defenses

Kato argues that we erred when we disallowed its affirmative defenses of waiver, estoppel and mitigation. Specifically, it argues that the CA's non-waiver clause should not have precluded its raising the issue of waiver at trial. The non-waiver clause provides: "The rights and remedies of the parties shall not be diminished waived or extinguished by the granting by one party of any indulgence forbearance or extension of time to the other party nor by any failure or delay by a party in asserting or exercising such rights or remedies." CA § 19. Kato asserts that Roboserve's continuing failure to complain about the additional 100 minibars and the lack of reasonable endeavors should estop it from taking refuge behind the clause.

Roboserve argues that we correctly upheld the integrity of the non-waiver clause. Roboserve made complaints about the 100 minibars and the lack of reasonable endeavors, but it was reluctant to pursue them. Kato "bullied" it into accepting the one-year test, making Roboserve fear that, if it pursued the complaints, it "would forever 'lose the Hyatt business.'" Pl.Br. at 14. Further, the point of the non-waiver clause was to avoid estoppel arguments such as that of Kato.

Non-waiver "clauses are enforceable [in] Illinois," *Monarch Coaches, Inc. v. ITT, Industrial Credit*, 818 F.2d 11, 13 (7th Cir.1987), and operate as a matter of law. *Transcraft Corp. v. Anna Indus. Dev. Corp.*, 223 Ill.

App.3d 100, 103, 165 Ill.Dec. 599, 584 N.E.2d 1033 (5th Dist.1991).

In *Transcraft*, the court gave "full force and effect" to a non-waiver clause when the plaintiff brought suit against a defendant who, for over twenty years, regularly and continuously breached the contract by failing to pay its portion of the local property taxes. *Id.* at 103, 165 Ill.Dec. 599, 584 N.E.2d 1033. The court stated:

> The NO WAIVER clause makes clear that any failure to demand strict performance or to take advantage of any terms, conditions, or rights was neither a waiver nor the relinquishment of the terms, conditions, or rights within the contract. Therefore, under the NO WAIVER clause, of the contract, [the defendant's] obligation to pay the excess taxes remains in full force and effect despite [the plaintiff's] failure to deduct the taxes it paid from rent.

Id. at 103, 165 Ill.Dec. 599, 584 N.E.2d 1033 (quotations removed). In fact, the appellate court believed that the clause remained in such "effect" that it reversed the lower court and remanded with directions to grant summary judgment on this issue in favor of the plaintiff. *Id.*

In *Gen. Grocer Co. v. Bachar*, the court gave similar weight to a non-waiver clause when the plaintiff brought suit against the defendant who, on various occasions, breached the security agreement by failing to pay on a date certain. 51 Ill.App.3d 907, 911-2, 8 Ill.Dec. 720, 365 N.E.2d 1106 (3rd Dist.1977). The court reasoned that, "[i]n the light of such 'non waiver' clause, which was agreed to by the defendants, we cannot interpret the plaintiff's conduct in accepting tardy payments (whether such instances be few or many) to constitute a suspension of the terms of an agreement to make payments on a date certain." *Id.* at 912, 8 Ill.Dec. 720, 365 N.E.2d 1106; *see Zinser v. Uptown Fed. Sav. and Loan*, 185 Ill.App.3d 979, 982-3, 134 Ill.Dec. 87, 542 N.E.2d 87

(1st Dist.1989), *appeal denied,* 128 Ill.2d 673, 139 Ill. Dec. 524, 548 N.E.2d 1080 (1990) (following *Gen. Grocer*).

On the other hand, in *Whalen v. K-Mart Corp.*, 166 Ill.App.3d 339, 345-6, 116 Ill.Dec. 776, 519 N.E.2d 991 (1st Dist), *appeal denied,* 121 Ill.2d 587, 122 Ill.Dec. 448, 526 N.E.2d 841 (1988), the court ruled that a "broad, general boilerplate [non-waiver clause] [do]es not negate [the plaintiff's] waiver" by conduct. *Id.* at 346, 116 Ill.Dec. 776, 519 N.E.2d 991. In *Whalen,* the plaintiff sued a contractor, who, in turn, sued his subcontractors for contribution and indemnity based on their contractual responsibility to name him in their insurance policy, which they did not do. Despite the subcontractors' failure to properly insure, the contractor allowed them to work. By doing so, he waived the responsibility to insure requirement. The court considered whether the contractor could then deny the waiver based on the contract's non-waiver clause. The court ruled that the contractor could not.

Whalen is distinguishable on three grounds from the other Illinois precedent and from our case. In *Whalen,* the contractor waived a condition precedent. The terms of the contract made clear that the subcontractors could not begin work until they had "obtained all insurances." *Id.* at 341, 116 Ill.Dec. 776, 519 N.E.2d 991. Further, the contractor reached back into a closed relationship. The suit arose after the subcontractors completed their work and received payment in full. Further still, the contractor included the non-waiver clause solely for his own benefit. *Id.* at 345, 116 Ill.Dec. 776, 519 N.E.2d 991. Reading *Whalen,* it appears that the court believed the contractor should not prevail, and, because it needed somehow to sidestep the non-waiver clause, it simply dismissed it as boilerplate and trotted out the "specific versus general" contract provision case law.

Transcraft sits atop a unified group of cases, except for *Whalen,* each of them upholding the integrity of the non-

waiver clause. On the basis of *Whalen*, Kato wants us read a split into Illinois law, but we decline to do so. We correctly ruled that the non-waiver clause precluded Kato's defense of waiver, particularly since "[t]here [was] no possible injustice in enforcing [it]." *Monarch Coaches*, 818 F.2d at 13. Moreover, we correctly did not allow Kato to enter through the back door with its defenses of estoppel and mitigation.

Therefore, once again, Kato is entitled to neither a judgment as a matter of law nor a new trial.

C. Wrongful Termination Claim

1. Background

Kato argues that the parties never completed the amended CA. Because the CA, not the amended CA, was operative and because the CA ran its course before Kato terminated the agreement on March 1, 1993, the termination was not wrongful, meaning it was not premature.

Roboserve argues that the parties did complete the amended CA and that the amended version was operative. Under the amended CA, the contract was not supposed to run its course until five years after Roboserve installed all 1000 minibars. The calendar, however, never began to run because Kato disallowed Roboserve's installation of all 1000. Consequently, when Kato terminated the contract it did so prematurely.[5]

2. Kato's Denial of Wrongful Termination

First, Kato argues that the amended agreement failed under § 26 of the CA, the contract's "waiver only in writing clause," which provides:

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[5] In the jury instructions, we approved a special interrogatory on this issue, and the jury found that the parties agreed to the amended CA and that the five year calendar never began to run.

> This Agreement and any other matters agreed in writing between the parties hereto in relation to the subject matter of this Agreement shall constitute the entire agreement between the Company and the Hotel in relation to such subject matter and no variation to the same shall be binding on the Company unless in writing and signed by both parties.

Because neither Kato nor one of its representatives signed the amended CA, the parties did not satisfy § 26, and, consequently, the amendment should not have bound Kato.

Roboserve responds that Kato satisfied § 26, and, if it did not, it waived the section. Kato satisfied § 26 with its signed December 14 letter in which it referenced the amendment and implied its binding authority. The letter states: "Pursuant to Section 4 of the June 23, 1986 Agreement between Roboserve, Inc. and Hyatt Corporation and the modification thereto dated October 2, 1986, be advised that Hyatt Corporation as agent for Kato Kagaku Company, Ltd., . . . hereby serves notice of termination of the Agreement on March 1, 1993." Alternatively, Kato waived § 26 through its words and deeds. The words included the December 14 letter and several letters from Kato's trial counsel, all of which indicated Kato's acceptance of the amended CA. Pl.Exs. 212-5. The deeds included terminating the agreement only after Kato believed the amended CA would soon run its course.

Clearly, if the parties satisfied § 26, that would be sufficient, and the amended agreement would control. Otherwise, "the weight of authority in Illinois holds that Waiver Only in Writing provisions can be waived by words and deeds of the parties so long as the waiver is proved by clear and convincing evidence." *Chicago College of Osteopathic Medicine v. Fuller Co.*, 776 F.2d 198, 202 (7th Cir.1985).

Based on our Statute of Frauds discussion, below, the parties satisfied § 26. In any event, given the December

14 letter, the several letters from Kato's trial counsel, and the timing of Kato's termination of the agreement, there is sufficient evidence to support jury's finding that Kato waived § 26. *See Id.* Therefore, on this point, Kato is entitled to neither a judgment as a matter of law nor a new trial.

Second, Kato argues that, without its signature, the amended CA failed under the Statute of Frauds.

Roboserve responds that Kato waived the Statute because it admitted being bound by the amended CA and, moreover, acted as if it were bound. Again, Roboserve points to the December 14 letter and the various letters from Kato's trial counsel.

The Illinois Statute of Frauds provides, in relevant part:

> No action shall be brought . . . to charge any person . . . upon any agreement that is not to be performed with the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

740 ILCS 80/1.

Illinois common law establishes the technical requirements for satisfying Statute of Frauds. "No particular form of memorandum is required to satisfy the statute (citation omitted), and it is not necessary that a . . . memorandum be in one writing, but may consist of several writings taken together." *Poulos v. Reda*, 165 Ill. App.3d 793, 800, 117 Ill.Dec. 465, 520 N.E.2d 816 (1st Dist.1987); *see Cafcas v. DeHaan & Richter, P.C.*, 699 F.Supp. 679 (N.D.Ill.1988). To satisfy the Statute "from more than one writing, only one of which has been signed, the signed writings must refer specifically to the other

writings and must be so connected, either physically or otherwise, as to show by internal evidence that they relate to the same contract." *Id.; see Bower v. Jones*, 978 F.2d 1004, 1008 (7th Cir.1992).

Moreover, Illinois case law establishes the theoretical requirements for satisfying the Statute. "The purpose of the Statute is to prevent the fraudulent enforcement of contracts that were not made, not to enable contractors to repudiate contracts that have in fact been made." *Poulos v. Reda*, 165 Ill.App.3d at 801, 117 Ill.Dec. 465, 520 N.E.2d 816. "State statutes of frauds serve a purely evidentiary function—to prevent enforcement through fraud or perjury of fictitious agreements." *Konigsberg Int'l, Inc. v. Rice*, 16 F.3d 355, 357 (9th Cir.1994). " 'To the extent that the statute's function is viewed as evidentiary, it is difficult to see why the statute should not be satisfied by a written admission in a pleading, stipulation, or deposition.' " *Bower*, 978 F.2d at 1009 (quoting II *Farnsworth on Contracts*, § 6.7, at 134 (1990)).

Kato's letters satisfied the technical and theoretical requirements of the Statute. As to the technical requirements, the December 14 letter referred specifically and internally to the amended CA. As to the theoretical requirements, the trial counsel's letters amounted to admissions that the parties completed the amended CA. *Paist v. Town and Country Corp.*, 772 F.Supp. 412, 416 (N.D.Ill. 1991). Therefore, on this point, Kato is entitled to neither a judgment as a matter of law nor a new trial.

Third, Kato argues that if its letters satisfied the Statute of Frauds, the satisfaction came too late. For support, Kato relies on *Culbertson v. Carruthers*, which stated that if "an offer prescribes no time for acceptance, a reasonable time is implied." 66 Ill. App.3d 47, 54, 22 Ill.Dec. 810, 383 N.E.2d 618 (5th Dist.1978). Kato contends that its letters did not arrive within a reasonable time.

Roboserve maintains that the letters arrived within a reasonable time and, if they did not, their late arrival merely evidenced an intended earlier, seasonable acceptance of the amended CA.

Whether Kato accepted or intended to accept Roboserve's offer within a reasonable time is a factual matter for the jury. Judgement as a matter of law is "inappropriate[] if the parties disagree on the inferences which may reasonably be drawn from those undisputed facts." *Cent. Nat'l Life Ins. Co. v. Fidelity and Deposit Co.*, 626 F.2d 537, 539-40 (7th Cir.1980); *see Paist*, 772 F.Supp. at 414-5. We determine, then, only whether the jury's finding was unreasonable. By referencing the amended CA in its December 14 letter, Kato revealed that it believed itself bound. Moreover, by maintaining its negotiations with Roboserve until it believed the amended CA would soon run its course, Kato acted as if it were bound. In light of these facts, the jury's finding was not unreasonable. Therefore, on this point, Kato is entitled to neither a judgment as a matter of law nor a new trial.

Fourth, Kato argues that Roboserve should not be able to treat the December 14 letter as an anticipatory breach because it was not a positive and unequivocal repudiation. For support, Kato states that Roboserve maintained its units in the HRC after the supposed March 1, 1993, termination date. Maintaining them there would not have been an option if Kato truly repudiated the contract.

Roboserve argues that it should be able to treat the December 14 letter as an anticipatory breach because the letter's language is positive and unequivocal and, after Kato breached, Roboserve promptly filed suit.

The case law on anticipatory repudiation is well settled. " 'Because the doctrine of anticipatory repudiation represents a harsh remedy, the requirement that a repudiating statement be clear and absolute is a strict one.' " *LAK*,

Inc. v. Deer Creek Enter., 976 F.2d 328, 331 (7th Cir. 1992) (quoting *Commonwealth Edison Co. v. Decker Coal Co.*, 612 F.Supp. 978, 981 (N.D.Ill.1985)). " 'To constitute an "anticipatory breach," . . . it must appear that the party bound under a contract has unequivocally refused to perform', or as the Supreme Court put it in *Dingley v. Oler* (citation omitted), there must be 'a positive, unconditional, and unequivocal declaration of fixed purpose not to perform the contract in any event or at any time.' " *City of Fairfax v. Washington Metro. Area Transit Auth.*, 582 F.2d 1321, 1326 (7th Cir. 1978), *cert. denied*, 440 U.S. 914, 99 S.Ct. 1229, 59 L.Ed.2d 463 (1979) (quoting *Suburban Improvement Co. v. Scott Lumber Co.*, 67 F.2d 335, 337 (4th Cir.1933)).

Once a party anticipatorily repudiates a contract, the non-breaching party may respond in a number of ways. "The promise may, among others,[6] elect to treat the repudiation as a breach putting an end to the contract for all purposes of performance." *Wilmette Partners v. Hamel*, 230 Ill.App.3d 248, 260, 171 Ill.Dec. 657, 594 N.E.2d 1177 (1st Dist.), *appeal denied*, 146 Ill.2d 654, 176 Ill.Dec. 824, 602 N.E.2d 478 (1992) (citing *Builders Concrete Co. v. Faubel & Sons, Inc.*, 58 Ill.App.3d 100, 104, 15 Ill.Dec. 517, 373 N.E.2d 863 (3rd Dist.1978)). "A promisee may pursue such an election by either promptly filing suit or by detrimentally changing his position in reliance on the repudiation." *Id.* (citing *Builder's Concrete*, 58 Ill.App.3d at 104, 15 Ill.Dec. 517, 373 N.E.2d 863). However, " '[a] continued willingness upon

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[6] "Upon receiving an anticipatory repudiation by the promisor, the promisee has a choice of pursuing three alternative remedies. The promisee may (1) rescind the contract and seek quasi-contractual relief; (2) attempt to keep the contract in force by awaiting time for the promisor's performance and then bringing suit; or (3) elect to treat the repudiation as a breach putting an end to the contract for all purposes of performance." *Builder's Concrete Co. v. Faubel & Sons*, 58 Ill.App.3d 100, 104, 15 Ill.Dec. 517, 373 N.E.2d 863 (3rd Dist.1978).

the part of the injured party to receive performance is an indication that, if the repudiator will withdraw his repudiation, but not otherwise, the contract may proceed. It is not an irrevocable election not to treat the renunciation as a breach.' " *Builder's Concrete*, 58 Ill.App.3d at 105, 15 Ill.Dec. 517, 373 N.E.2d 863 (quoting *Bu-Vi-Bar Petroleum Corp. v. Krow*, 40 F.2d 488, 492 (10th Cir. 1930)).

Whether Kato intended to anticipatorily breach depends on the construction of the December 14 letter. Mr. Keeshin titled his letter "Termination of Concession Agreement." Further, in the body of the letter, he wrote that "Kato . . . hereby serves notice of termination of the [CA]." The plain language of the letter supports Roboserve's claim that Kato intended to anticipatorily breach.

Whether Roboserve responded properly after the breach depends on if it brought suit promptly or changed its position detrimentally. *Wilmette Partners*, 230 Ill.App.3d at 260, 171 Ill.Dec. 657, 594 N.E.2d 1177. The record reflects that, initially, Roboserve continued to receive performance, hoping that Kato would withdraw its repudiation. When Kato refused, Roboserve contested Kato's right to terminate the agreement. Tr. at 878. Once Roboserve believed that the contest was futile, it brought suit in August. Whether it filed suit promptly after the contest appeared hopeless is a matter for the jury. Given the time it takes large corporations to run the course of one option and gear up for the next, particularly if it is litigation, we find that the jury's verdict was not against the clear weight of the evidence. Therefore, on the issue of liability, Kato is entitled to neither a judgment as a matter of law nor a new trial.

On the other hand, under *Wilmette Partners* and *Builder's Concrete*, if a party chooses to treat the repudiation as a wrongful termination, it cannot toll the time for beginning to collect from the breaching party beyond the date of termination. Therefore, we grant Kato's motion

for a judgment as a matter of law with regard to when the five year calendar began to run, and we determine that it began on the date of termination, March 1, 1993. Below, in the damages section, we will revisit this issue.

Therefore, on the issue of liability, we deny Kato's motion for judgment as a matter of law, but on the issue of damages, we grant its motion in part. We deny Kato's alternative motion for new trial.

D. Fraud Claim

1. Kato's Denial of Fraud

Kato denies that Hyatt perpetrated a fraud. It argues that the November 11 "one-year test" letter was not false when made because Mr. Connolly had a side agreement with ServiSystems that enabled Hyatt to nullify the contract if need be. It also argues that Hyatt did not induce Roboserve to rely on its supposedly false statement. Roboserve never asserted its rights under the CA for Kato to induce it to forego enforcing them. Moreover, if Roboserve did assert its rights, Kato would have had no reason to induce it to forego enforcing them because Kato's agreement with Roboserve was at least as profitable as Kato's agreement with ServiSystems.

Roboserve maintains that it made the necessary allegations to allege Hyatt's fraud. It alleged that Hyatt made an untrue material statement in the November 11 letter, which announced the "one-year test."[7] Hyatt knew the statement was untrue because Mr. Connolly earlier signed the "noncancellable and unconditional" agreement with ServiSystems. Pl.Ex. 45. Hyatt made the untrue statement to induce Roboserve's reliance. It wrote the letter and, subsequently, staged negotiations so Roboserve would forego enforcing its rights under the amended CA

[7] Roboserve also alleged that Hyatt orally promised that the winner of the test would "get the [broader] Hyatt business," meaning the business from Hyatt hotels other than the HRC.

and so Hyatt could continue enjoying its allegedly more profitable agreement with ServiSystems. Roboserve reasonably relied on Hyatt's false statement because it came from Mr. Zadikoff, a vice president of Hyatt. Finally, Roboserve's reasonable reliance led to its injury; Hyatt prevented it from getting the HRC and other Hyatt business and caused it to incur business and legal expenses.

Whether Kato's statement was false when made and whether it induced Roboserve to rely on its statement are issues of fact for the jury. Based on the above discussion, we believe that the jury did not act against the clear weight of the evidence when it found in favor of Roboserve. Therefore, on this point, Kato is entitled to neither judgment as a matter of law nor a new trial.

2. Kato's Denial of Vicarious Liability for Fraud

Kato argues that, if Hyatt perpetrated a fraud, Kato can be liable for it only as it relates to the HRC, not the rest of the Hyatt hotels. As a sophisticated player, Roboserve knew that all Hyatts were individually owned, that Kato owned only the HRC, and that Kato hired Hyatt to manage only the HRC. On those facts, Roboserve could not reasonably rely on a statement from Hyatt that would bind Kato beyond the HRC.

Roboserve argues that Kato cloaked Hyatt in apparent authority to bind Kato beyond its means. Actually, Roboserve's argument takes shape not as an "apparent authority to bind," but as some hybrid such as an "apparent authority to leverage." In Roboserve's own words, "Kato put Hyatt in a position where Hyatt could use promises of other Hyatt business to wrest concessions from Roboserve in [its] dealings with [the HRC]." Pl.'s Br. at 8. For support, Roboserve points to Mr. Keeshin's June 21, 1990, letter in which he discussed Roboserve's relationship with the HRC, other Hyatt hotels, and the Hyatt Corporation. Pl.Ex. 58.

The nature and extent of an agent's ability to bind a principal are well established.

> An agent's actions might bind the principal based on express, implied, or apparent authority. The first two are species of actual authority. Implied authority is actual authority implied by facts and circumstances, and may be proved by circumstantial evidence. By contrast, apparent authority is a form of estoppel arising exclusively from the principal's words or conduct. It exists where a principal, by his own words and deeds, creates in a third party the reasonable impression that an agent has authority to perform a certain act on the principal's behalf. The elements of apparent agency are (1) the principal's consent to or knowing acquiescence in the agent's exercise of authority, (2) the third party's knowledge of facts giving rise to (3) a good faith belief that the agent possessed authority to perform the act on the principal's behalf, and (4) the third party's detrimental reliance on the agent's apparent authority.

Wabash Publishing Co. v. Stoppa, 1994 WL 48785, at *4, 1994 U.S.Dist.Lexis 1522, at *12-3 (N.D.Ill. Feb. 14, 1994) (citations omitted); *see Wabash Indep. Oil Co. v. King and Wills, Ins. Agency*, 248 Ill.App.3d 719, 724, 188 Ill.Dec. 644, 618 N.E.2d 1214 (5th Dist.), *appeal denied*, 153 Ill.2d 570, 191 Ill.Dec. 630, 624 N.E.2d 818 (1993). If an agent exceeds the scope of his authority, he incurs liability on himself, not his principal. *Degen v. Amer. Ass'n of Oral and Maxillofacial Surgeons*, 1994 WL 13754, at *3 (N.D.Ill. Jan. 14, 1994).

Whether for purposes of binding or leverage, an apparent agency relationship cannot follow from Roboserve's evidence. For example, there is nothing to suggest that Kato, "by [its] own words and deeds, creat[ed] in [Roboserve] the reasonable impression that [Hyatt] ha[d] authority to" leverage its negotiations with other Hyatt busi-

ness. *Wabash Publishing*, 1994 WL 48785, at *4, 1994 U.S.Dist.Lexis 1522, at *13. Because Mr. Keeshin is a Hyatt employee, his June 21 letter cannot be enough; it is not "exclusively" Kato's "word[] or deed[]." *Wabash Publishing*, 1994 WL 48785, at *4, 1994 U.S.Dist.Lexis 1522, at *13. Moreover, given Roboserve's sophistication, it could not have had a "good faith," "reasonable impression" that Hyatt's authority from Kato extended beyond the HRC. *Wabash Publishing*, 1994 WL 48785, at *4, 1994 U.S.Dist.Lexis 1522, at *13. On such an important matter in an arm's length deal, Roboserve must point to more than the agent's puffing.[8] Hyatt may have been a zealous manager for its clients, but Roboserve cannot place at Kato's feet liability for fraud that extended beyond its domain, certainly not the value of all leverageable business beyond its domain. That would be letting the tail wag the dog.

When we view all of the evidence "in its aspect most favorable to" Roboserve, the evidence still overwhelmingly favors Kato. *Hardin*, 962 F.2d at 640. Therefore, to the extent that the jury found Kato vicariously liable for Hyatt's fraud beyond the HRC, we grant Kato's motion for judgment as a matter of law. Below, in the damages section, we will revisit this issue.

E. Punitive Damages

1. Kato's Denial of Gross Fraud

Kato argues that we should reverse the punitive damages award because Hyatt committed no gross fraud. Kato contends that this was just a case of the right hand not knowing what the left hand was doing. Specifically, when Mr. Zadikoff wrote the November 11 letter, he was unaware of the contract with ServiSystems. Moreover, when he and Mr. Keeshin learned of the ServiSystems con-

[8] Roboserve could have named Hyatt as a party, but it chose not to, and that choice has consequences here.

tract, they understood it to include Mr. Connolly's oral side agreement, the one that would have allowed Kato to withdraw from the contract if need be.

Roboserve maintains that the November 11 letter instigated the Kato-authorized fraud, the "gross" nature of which arose during the multi-year cover-up of the Servi-Systems contract. The cover-up constituted, for example, withholding information about the contract and staging negotiations with Roboserve.

"A federal court sitting in diversity looks to the law of the state, Illinois, in determining the appropriateness of punitive damages." *Europlast, Ltd. v. Oak Switch Sys.*, 10 F.3d 1266, 1276 (7th Cir.1993). "While it is true that punitive damages are unavailable in contract cases in Illinois, . . . there is an exception when the defendant is also found to have committed an independent tort, separate from the breach of contract." *Hardin*, 962 F.2d at 638.

"Illinois courts do not favor punitive damages and insist that plaintiffs must establish 'not only simple fraud but gross fraud, breach of trust, or "other extraordinary or exceptional circumstances clearly showing malice or wilfulness."' " *Europlast*, 10 F.3d at 1276 (quoting *AMPAT/Midwest v. Ill. Tool Works, Inc.*, 896 F.2d 1035, 1043 (7th Cir.1990) (quoting another source)). "In a case involving intentional fraud, 'punitive damages are properly recoverable . . . "where the false representasions are wantonly and designedly made."' " *West v. W. Casualty and Sur. Co.*, 846 F.2d 387, 398 (7th Cir.1988) (quoting *Home Sav. and Loan Ass'n v. Schneider*, 108 Ill.2d 277, 284, 91 Ill.Dec. 590, 483 N.E.2d 1225 (1985) (quoting another source)).[9]

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[9] "Today, the nature of punitive damages in Illinois is clearly singular—it is punishment for the defendant. (citation omitted). That punishment is designed in turn to promote three purposes: (1) to act as retribution against the defendant; (2) to deter the

The record will not likely reflect a defendant's motives outwardly or objectively. "[T]he transcript of a trial in a fraud case will seldom reveal admissions by the defendant that his conduct was not only fraudulent but intentionally, willfully, or recklessly so." *Durant v. Sur. Homes Corp.*, 582 F.2d 1081, 1088 (7th Cir.1978).

On the other hand, evidence of a pattern of conduct can imply a defendant's motives and support an award of punitive damages. "Punitive damages are appropriate [where] . . . the course of the [defendants'] conduct . . . demonstrates a continuing pattern of deceit." *Merrill Lynch Mortgage Corp. v. Narayan*, 1989 WL 4222, at *2, 1989 U.S.Dist.Lexis 423, at *4 (N.D.Ill. January 17, 1989). "The record here does not support the punitive damage award made by the trial court. Taken as a whole, the record does not establish a pattern of bad faith by [the defendant] during its dealings with [the] plaintiffs." *Kleidon v. Rizza Chevrolet, Inc.*, 173 Ill.App.3d 116, 122, 122 Il.Dec. 876, 527 N.E.2d 374 (1st Dist.), *appeal denied*, 123 Ill.2d 559, 128 Ill.Dec. 891, 535 N.E.2d 402 (1988). "The jury was entitled to conclude that this conduct was deliberate and purposeful, orchestrated by responsible management over a significant period of time." *West*, 846 F.2d at 398.

" '[W]here a plaintiff's factual allegations are sufficient to state a legally cognizable claim for punitive damages, the trial court has discretion to submit the issue to the jury.' " *AMPAT/Midwest*, 896 F.2d at 1044 (quoting *Motsch v. Pine Roofing Co.*, 178 Ill.App.3d 169, 177, 127 Ill.Dec. 383, 533 N.E.2d 1 (1st Dist.1988)).

Under cases such as *West*, Roboserve's supported allegation of a multi-year cover-up was evidence of a pat-

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defendant from committing similar wrongs in the future; and (3) to deter others from similiar conduct." *Hazelwood v. Ill. Cent. Gulf R.R.*, 114 Ill.App.3d 703, 712, 71 Ill.Dec. 320, 450 N.E.2d 1199 (1983).

tern of conduct sufficient to state a legally cognizable claim for punitive damages. *See, e.g.*, 846 F.2d at 400. Based on that evidence, we properly exercised our discretion and allowed the issue to go to the jury. Moreover, given the duration and scale of the alleged cover-up, the jury's award of punitive damages was not against the clear weight of the evidence. Therefore, on this issue, Kato is entitled to neither a judgment as a matter of law nor a new trial.

2. *Kato's Denial of Vicarious Liability for Gross Fraud*

Kato argues that, if Hyatt committed gross fraud, Kato should not be held vicariously liable for it. Although "[Hyatt] was engaged to manage [the] HRC," "[t]here was no evidence that [Hyatt] was an officer or director of Kato, that any of its employees were officers or directors of Kato, or that [Hyatt] was a division of Kato." Def.Br. at 9. Instead, "[t]he agents whose conduct was sought to be imputed to Kato were in fact agents of Kato's agent, [Hyatt], acting with respect to proposed transactions unrelated to [Hyatt]'s operation of Kato's hotel." *Id.*

Roboserve maintains that Kato is vicariously liable because, in Illinois, corporate principals are liable for the gross fraud of their managerial agents. *See Mattyasovszky v. West Towns Bus Co.*, 61 Ill.2d 31, 36-7, 330 N.E.2d 509 (1975). Because Kato admits that Hyatt was its managerial agent, the damage award should stand.

Illinois follows the Restatement (Second) of Agency § 217C ("§ 217C"), which provides:

> Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if: (a) the principal authorized the doing and the manner of the act, or (b) the agent was unfit and the principal reckless in employing him, or (c) the agent was employed in a managerial

> capacity and was acting within the scope of employment, or (d) the principal or a managerial agent of the principal ratified or approved the act.

Mattyasovszky, 61 Ill.2d at 36-7, 330 N.E.2d 509. The issue is whether, pursuant to § 217C(c), Hyatt was an "agent . . . employed in a managerial capacity."

Some Illinois appellate courts have diverged from the plain language of § 217C, confusing the definition of the term. Those courts have allowed vicarious liability only when the agents are "superior officers" such as "officers and directors." For example, in *Tolle v. Interstate Sys. Truck Lines*, the court favorably noted that "[o]ther courts have followed a complicity rule whereby the corporate master is liable for punitive damages only when the superior officers order, participate in, or ratify outrageous conduct." 42 Ill.App.3d 771, 773, 1 Ill.Dec. 437, 356 N.E.2d 625 (5th Dist.1976) (citing *Roginsky v. Richarson-Merrell, Inc.*, 378 F.2d 832, 842-3 (2nd Cir. 1967)); *see Oakview New Lenox School Dist. v. Ford Motor Co.*, 61 Ill.App.3d 194, 200, 19 Ill.Dec. 43, 378 N.E.2d 544 (3rd Dist.1978) (following the language in *Tolle*); *Pendowski v. Patent Scaffolding Co.*, 89 Ill.App. 3d 484, 44 Ill.Dec. 544, 411 N.E.2d 910 (1st Dist.1980) (continuing to follow the language in *Tolle*).

Only one court, *Kemner v. Monsanto Co.*, 217 Ill.App. 3d 188, 160 Ill.Dec. 192, 576 N.E.2d 1146 (5th Dist.), *appeal denied*, 142 Ill.2d 655, 165 Ill.Dec. 918, 584 N.E.2d 130 (1991), has considered the "managerial agent" and "superior officer" language and presented definitions of the two terms. *Id.* at 206-8, 160 Ill.Dec. 192, 576 N.E.2d 1146. It defined "managerial agent" as "an employee who acts with supervisory authority, being invested with general powers to exercise discretion and judgment in dealing with corporate matters; his interests are identified with those of the corporation. . . ." *Id.* Next, it defined "superior agent" by quoting *Tolle*:

> [U]nless, as charged [by the court], 'the officers or directors, that is, the management' of the company or the relevant division 'either authorized, participated in, consented to or, after discovery, ratified the conduct' giving rise to such damages. [Citations]. New York, in other words, adheres to the 'complicity rule,' holding the corporate master liable for punitive damages 'only when superior officers either order, participate in or ratify outrageous conduct.'

Id. at 206-7, 160 Ill.Dec. 192, 576 N.E.2d 1146 ((quoting *Tolle*, 42 Ill.App.3d at 773, 1 Ill.Dec. 437, 356 N.E.2d 625) (quoting *Roginsky*, 378 F.2d at 842)).

The court implicitly sided with the *Tolle* definition: "As noted in *Pendowski*,[10] this [respondeat superior] instruction, while valid under other circumstances, was ill-suited to convey the correct principles of law to the jury, since it could impute liability for *any* act done by an employee, rather than only those specifically ordered, participated in, or ratified by a superior officer." *Id.* at 208, 160 Ill.Dec. 192, 576 N.E.2d 1146 (citing *Pendowski*, 89 Ill.App.3d at 487, 44 Ill.Dec. 544, 411 N.E.2d 910).

Two significant cases reveal, however, that Illinois courts continue to follow the plain language definition of "managing agent." First, in *Deal v. Byford*, 127 Ill.2d 192, 130 Ill.Dec. 200, 537 N.E.2d 267 (1989),[11] the plaintiff apartment resident sued SRP Associates ("SRP"), a partnership that owned the plaintiff's apartment, for the actions of Mr. Byford, the apartment complex's sometime manager, sometime handyman. *Id.* at 195-6, 130 Ill. Dec. 200, 537 N.E.2d 267. The plaintiff complained that Mr. Byford used verbal and physical threats to remove her from the apartment. The record showed that Mr. Byford's implied managerial duties included signing

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[10] One of *Tolle*'s progeny.

[11] This one preceded *Kemner*, but it is an Illinois Supreme Court opinion. See footnote 12.

"documents" for SRP such as five-day notices. *Id.* at 198, 130 Ill.Dec. 200, 537 N.E.2d 267. More importantly, the record showed that the defendant admitted that Mr. Byford was the apartment complex's residential manager and that, as such, he was a managing agent. *Id.* at 205-6, 130 Ill.Dec. 200, 537 N.E.2d 267. Based on that showing, the court "conclude[d] that SRP's admissions were sufficient . . . to satisfy the standard expressed in *Mattyasovszky* and Restatement [217C] for the imposition of punitive damages against a principal when the agent is employed in a managerial capacity. . . ." *Id.* at 206, 130 Ill.Dec. 200, 537 N.E.2d 267.[12]

As in *Deal,* Kato admits that Hyatt was the HRC's manager and that, as such, Hyatt was a managing agent. As in *Deal,* that should be sufficient for the imposition of punitive damages.[13]

Second, in *Abshire v. Stoller,* 235 Ill.App.3d 849, 176 Ill.Dec. 559, 601 N.E.2d 1257 (1st Dist.1992), *appeal denied,* 148 Ill.2d 639, 183 Ill.Dec. 15, 610 N.E.2d 1259 (1993), the plaintiff claimed "that he was misled by Stoller's representation that a construction loan ha[d] been obtained." *Id.* at 859, 176 Ill.Dec. 559, 601 N.E.2d 1257. Consequently, the plaintiff sued Stoller and his employer

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[12] Kato does not argue that Hyatt acted outside the scope of its employment.

[13] The *Kemner* court distinguished *Deal* by giving it a "close reading" and finding that the defendant was a partnership, not a corporation. Presumably, this distinguishing feature precluded the defendant from having "superior officers." That, in turn precluded the court from applying the "superior officer" standard. Because the defendant was, in a sense, off the scale, the court could attach liability. The *Kemner* court believed that, because corporations are on the scale, it should not so loosely interpret the standard for vicarious liability. The *Kemner* court's attempt to distinguish *Deal* is unpersuasive. First, the *Deal* court provided no grounds for believing it placed weight on the corporate versus partnership distinction. Second, the *Deal* court did not, as it easily could have done, analogize the corporate "superior officer" to the partnership "partner status," and Mr. Byford was no partner.

Salk, Ward & Salk, Inc. ("Salk"). The evidence showed that "Stoller's authority was limited to calling potential customers, gathering preliminary information, and completing an application form to submit to others at Salk who would then decide on the appropriateness of a particular borrower or project for further consideration." *Id.* at 857, 176 Ill.Dec. 559, 601 N.E.2d 1257. The jury found Salk vicariously liable for punitive damages, and the appellate court reversed the jury's finding.

In its *Mattyasovszky* analysis, the court considered two definitions of "manager," one from *Kemner* and the other from *Adams v. Zayre Corp.*, 148 Ill.App.3d 704, 102 Ill.Dec. 121, 499 N.E.2d 678 (2nd Dist.1986). From *Kemner*, the *Abshire* court quoted only its "managerial agent" and "managerial employee" language, fully discounting its "superior officer" language. *See Kemner*, 217 Ill.App.3d at 206-8, 160 Ill.Dec. 192, 576 N.E.2d 1146. From *Adams*, the *Abshire* court gleaned a similar definition of "managing agent," namely one who is "in a position of authority or control." In the end, the *Abshire* court wrote:

> Whether we adopt the definition of a manager discussed in *Kemner* or the manager discussed in *Adams* whose authority was limited to a specific department, we conclude that Stoller, the agent in this case, could not be considered a manager in either context where he had no authority or responsibility for any other employees or the operation of any department within the corporation.

Id., 235 Ill.App.3d at 859, 176 Ill.Dec. 559, 601 N.E.2d 1257.

Although the *Abshire* court reached no conclusion on the full definition of "managing agent," the opinion remains important. It showed that the range of possible definitions need not include "superior officers." Further, it showed that, whatever the full definition of the term,

the baseline includes only the concept of responsibility for other employees or the oversight of a corporate department.

As discussed in *Abshire,* Hyatt had responsibility for other employees; it managed the entire HRC. Also, Hyatt was in charge of a corporate department, or an equivalent, the HRC. As in *Abshire,* that should be sufficient for the imposition of punitive damages.

In any event, the split in the definition between "managing agent" and "superior officer" is more apparent than real. In *Kemner,* the "plaintiffs contend[ed] that the use of the term 'managerial agent' [was] consistent with *Mattyasovszky,* and that *Tolle* and *Pendowski* [wrongly] impose[ed] a stricter burden of proof on the plaintiffs through their use of the term 'superior officer.' " *Id.*, 217 Ill.App.3d at 206, 160 Ill.Dec. 192, 576 N.E.2d 1146. The court wrote: "Although plaintiffs assert that there is 'a big difference' between the terms, no case law is cited in support of this contention." *Id.* Apparently, then, the court did think it self-evident that there was "a big difference" between the terms, and the court did not go on to explain one.

As the *Kemner* court hinted, there is, in fact, no "big difference" between the terms. The *Tolle* court and its progeny took the "superior officer" language from *Roginsky,* a Second Circuit case from New York. In *Pirre v. Printing Developments, Inc.*, 468 F.Supp. 1028 (S.D. N.Y.), *aff'd without op.*, 614 F.2d 1290 (2nd Cir.1979), the New York court provided a definition of "superior officer:"

> The test of who is a 'superior officer' or a 'person of authority' to bind the corporate entity to participation or ratification cannot be rigid . . .[.] The question is whether the act or ratification is done by a person of such responsibility as to arouse the 'institutional conscience' . . .[.] The test is whether the continuing tortious conduct has been brought home

> to the consciousness of a relatively important managerial personnel with authority to make a decision for the corporation that would have prevented the damage.

Id. at 1039 (quoting *Doralee Estates v. City Service Oil Co.*, 569 F.2d 716, 722 (2nd Cir. 1977)).

Every Illinois court that discusses vicarious liability in some detail reproduces a quote such as the one from *Pirre*. For example, in *Kemner*, the court reproduced the following:

> The complicity rule . . . seems consistent with the rationale behind the concept of punitive damages. Either as a basis for punishment or for deterrence of wrongdoers, some deliberate corporate participation should be shown before this sanction is applied. [Citation]. The complicity analysis will allow punitive damages where the institutional conscience of the corporate master should be aroused while protecting the corporate master from liability for punitive damages when a properly supervised employee acts with requisite circumstances of aggravation.

217 Ill.App.3d at 204, 160 Ill.Dec. 192, 576 N.E.2d 1146 (quoting *Tolle*, 42 Ill.App.3d at 773-4, 1 Ill.Dec. 437, 356 N.E.2d 625) (added emphasis removed). The bottom line is that, like the New York courts, the Illinois courts are concerned with tortious conduct that touches the corporate conscience.

The apparent split arose from several courts taking the words "superior officer" from the New York opinions and using them as a proxy for "corporate conscience." They used the words because superior officers, or officers and directors, are generally the ones who embody the corporate conscience. In other words, the superior officers are good examples of holders of the corporate conscience, and those examples usually suffice to exclude from consideration the agent at issue.

In *Tolle*, it sufficed to exclude the truck driver from incurring liability on his principal. *See* 42 Ill.App.3d at 772, 1 Ill.Dec. 437, 356 N.E.2d 625. In *Oakview*, it sufficed to exclude the auto mechanic. *See* 61 Ill.App.3d at 196, 19 Ill.Dec. 43, 378 N.E.2d 544. In *Pendowski*, it sufficed to exclude the scaffolding worker. *See* 89 Ill.App.3d at 486, 44 Ill.Dec. 544, 411 N.E.2d 910. In *Kemner*, it sufficed to exclude the train driver. *See* 217 Ill.App.3d at 194, 160 Ill.Dec. 192, 576 N.E.2d 1146. In *Brummerstedt v. Amer. Airlines, Inc.*, 845 F.Supp. 532 (N.D.Ill.1993), it sufficed to exclude the baggage handler. *Id.* at 533. On the other hand, in *Kochan v. Owens-Corning Fiberglass Corp.*, 242 Ill.App.3d 781, 182 Ill.Dec. 814, 610 N.E.2d 683 (5th Dist.), *appeal denied*, 152 Ill.2d 561, 190 Ill.Dec. 891, 622 N.E.2d 1208 (1993), *and cert. denied*, —— U.S. ——, 114 S.Ct. 1219, 127 L.Ed.2d 565 (1994), it sufficed to include the company president. *Id.* at 796-7, 182 Ill.Dec. 814, 610 N.E.2d 683. Kato's argument simply takes advantage of the fact that the Illinois court's sometimes import by rote the words "superior officers" when they intend nothing more than to decide their cases clearly, objectively and simply.

This case is a strong example of why there is no "big difference" between the terms. Here, the usual proxies for corporate conscience are imperfect. The principal, Kato, hired another corporation, Hyatt, to manage its hotel, the HRC. Kato admits that it hired Hyatt, that Hyatt was its agent and that Hyatt managed the hotel. Despite Kato's admitting that it gave Hyatt such enormous responsibility for the operation of its property, Kato suggests that Hyatt's actions did not "arouse[]" its "institutional conscience." *Kemner*, 217 Ill.App.3d at 204, 160 Ill.Dec. 192, 576 N.E.2d 1146. It suggests that a corporation can extricate from its conscience actions of its managers simply by placing them behind another corporate structure. Consciences, whether corporate or individual, are not that limited. Further, we cannot fault the jury

members who, following the letter and spirit of their state's law, shared the same belief.

Therefore, despite *Kemner*, the Illinois courts have not limited the scope of vicarious liability to exclude agents who satisfy the plain language of § 217C. Based on the above discussion, the courts have not gone so far from *Mattyasovszky* that a defendant can successfully argue that its admitted managerial agent is not a "managerial agent." Therefore, on this issue, Kato is entitled to neither judgment as a matter of law nor a new trial.

F. Damages

1. Standard of Review

"Because fixing a damage award is an exercise in fact-finding, only those awards that are 'monstrously excessive,' born of passion and prejudice, or not rationally connected to the evidence may be altered." *Pincus v. Pabst Brewing Co.*, 893 F.2d 1544, 1554, *reh'g denied*, (7th Cir.1990) (quoting *Matter of Innovative Const. Sys., Inc.*, 793 F.2d 875, 887-8 (7th Cir.1986)). Below, we refer to this standard of review as "the *Pincus* standard."

2. The Contract Claim

Kato argues that, for two reasons, Roboserve improperly used a lost profits theory of recovery. One, it was improper because Roboserve could not determine its loss with a reasonable degree of certainty. Kato had an obligation to use reasonable endeavors, but it could not know beforehand which guests would make minibar purchases. Because there was no way to know, Roboserve was left trying to distinguish between the profits it lost due to Kato's failure to perform and those it lost due to the luck of the draw. Kato argues that Roboserve had no principled way to distinguish the instances. Two, it was improper because it produced an award that was not within

Kato's reasonable contemplation. Because Roboserve did not have an exclusive contract with Kato, it could not lay claim to all of the minibar profits from the HRC. Yet because Roboserve nonetheless used ServiSystems' profits to calculate its loss, it calculated an overcompensatory amount.

With a three-part argument, Roboserve maintains that it properly used the lost profits theory. One, Kato could have known with some degree of certainty who the "correct" people were because it conducted a study of its Gold Passport rooms and found that the people who stayed in them made minibar purchases with a much higher frequency than average. Two, based on that study, the CA obligated Kato to fill the Gold Passport rooms with RoboBars.[14] Three, the supply of RoboBars at the HRC exceeded the demand each night for minibars of either brand. Therefore, Kato could have put the "correct" people in the "correct" rooms, and, if it had done so, Roboserve's supply would have met the demand. Because of this reasonable endeavors/excess supply situation, the CA became analogous to an exclusive contract, making Roboserve's use of the "competitor's profits" theory a proper choice.[15]

The proper amount of damages for a breach of contract claim is that amount which makes the non-breaching party whole, meaning that amount which puts the non-breaching party in the position he would have occupied had the parties fulfilled their obligations.

"There are three [requirements] to apply in determining whether lost profits will be allowed as compensation in [a] contract case[]":

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[14] Instead, Kato filled the Gold Passport rooms with Servibars.

[15] At trial, Roboserve proved what those profits were and how much of them Roboserve would have made given that its and ServiSystems' contracts were different. Tr. at 707 *et seq.*

> 'Lost profits will be allowed if (1) their loss is proved with a reasonable degree of certainty [citations omitted]; (2) the court is satisfied that the wrongful act of the defendant caused the loss of profits [citation omitted]; and (3) the profits were reasonably within the contemplation of the defaulting party at the time the contract was entered into [citation omitted].'

Vranas & Assocs., Inc. v. Family Pride Finer Foods, Inc., 147 Ill.App.3d 995, 1007, 101 Ill.Dec. 151, 498 N.E.2d 333 (2nd Dist.1986), *appeal denied*, 113 Ill.2d 586, 106 Ill.Dec. 57, 505 N.E.2d 363 (1987) (quoting *Rivenbark v. Earnest, Inc.*, 37 Ill.App.3d 536, 538-9, 346 N.E.2d 494 (5th Dist.1976)).

"Under Illinois law, it is not necessary to prove lost profits with 'absolute certainty.' " *Havoco of Amer., Ltd. v. Sumitomo Corp. of Amer.*, 971 F.2d 1332, 1345, *reh'g denied*, (7th Cir. Sept. 9, 1992) (quoting *Midland Hotel Corp. v. Donnelley Corp.*, 118 Ill.2d 306, 315, 113 Ill. Dec. 252, 515 N.E.2d 61 (1987)). Although "an award for lost profits 'cannot be based upon conjecture or sheer speculation,' mathematical precision is not possible or required." *Id.* (quoting *Midland Hotel*, 118 Ill.2d at 315-6, 113 Ill.Dec. 252, 515 N.E.2d 61); *see Independence Tube Corp. v. Copperweld Corp.*, 691 F.2d 310, 328 (7th Cir.1982), *rev'd on other grounds*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). "Rather, 'a recovery may be had for prospective profits when there are any criteria by which the probable profits can be estimated with reasonable certainty.' " *Id.* (citation omitted). Moreover, "a defendant whose actions contribute to the difficulties of accurate measurement is in a poor position to demand precision." *Independence Tube*, 691 F.2d at 329.

In *Vranas*, the court reaffirmed the standard for determining whether profits are reasonably within the con-

templation of the defaulting party. 147 Ill.App.3d at 1007, 101 Ill.Dec. 151, 498 N.E.2d 333.

> 'As a general rule . . . the damages to which one party to a contract is entitled because of a breach thereof by the other are such as arise naturally from the breach itself, or such as may reasonably be supposed to have been within the contemplation of the parties at the time of making the contract as a probable result of a breach thereof. . . .
>
> 'In the application of the rule it is held that the parties will be presumed to have contemplated that the party injured by the breach of the contract would sustain such damages as would fairly and substantially, in the usual course of things, result from such breach, in light of all the facts known or which should have been known to them. . . .
>
> '. . . It is not required that the parties shall have considered the consequences at the time of making the contract, but the consequences must be such as the parties may fairly be supposed to have considered, or at least would have considered as flowing from a breach of the contract if they had then been informed of all of the facts.'

Id. at 1007-8, 101 Ill.Dec. 151, 498 N.E.2d 333 (quoting *Sitnick v. Glazer,* 11 Ill.App.2d 462, 467-8, 138 N.E.2d 84 (1st Dist.1956)).

Plaintiffs generally follow either of two methods when figuring their amount of lost profits. If they follow the methods properly, they should satisfy the reasonable certainty and reasonable expectation requirements. In the first method, which is the preferred one, plaintiffs figure the amount of lost profits with reference to their own previous profits, extrapolating them over the years of the breach. For example, in *Bergner & Co. v. Lloyds Jewelers, Inc.,* 130 Ill.App.3d 987, 86 Ill.Dec. 59, 474 N.E.2d 1256 (3rd Dist.1984), *rev'd on other grounds,* 112 Ill.2d

196, 97 Ill.Dec. 415, 492 N.E.2d 1288 (1986), the court wrote: "projection of future profits by Lloyds' expert witness was based on Lloyds' performance in prior years. This is the generally accepted method of calculating lost profits." *Id.* at 993, 86 Ill.Dec. 59, 474 N.E.2d 1256. Similarly, in *Klucznik v. Nikitopoulos,* 152 Ill. App.3d 323, 105 Ill.Dec. 141, 503 N.E.2d 1147 (2nd Dist. 1987), the court stated that "[we] have frequently recognized that lost profits may appropriately be calculated by using profits realized in prior years." *Id.* at 329, 105 Ill.Dec. 141, 503 N.E.2d 1147.

In the second method, plaintiffs figure the amount with reference to their competitor's profits. Plaintiffs typically use this method when there is a breach of an exclusive sales contract. For example, in *Oakleaf v. Oakleaf & Assoc., Inc.,* 173 Ill.App.3d 637, 123 Ill.Dec. 288, 527 N.E.2d 926 (1st Dist.), *appeal dismissed without op.,* 123 Ill.2d 560, 128 Ill.Dec. 892, 535 N.E.2d 403 (1988), the court held that "[v]iolations of exclusive sales contracts can be recompensed by a damage award based on the amount of sales made by a competitor in the identified territories." *Id.* at 648, 123 Ill.Dec. 288, 527 N.E.2d 926 (citing *Transcon, Inc. v. Motion Inc.,* 114 Ill.App.3d 61, 302 N.E.2d 135 (1st Dist.1973)).

The "lost profits" problem this case presents is not one of first impression. In *Superbird Farms, Inc. v. Perdue Farms, Inc.,* 970 F.2d 238 (7th Cir.1992), the defendant argued that "the record lack[ed] sufficient evidence to support the jury's damage award as remitted by the district judge because the evidence presented by [the plaintiff] through its damage expert, Dr. Rhan, was speculative and went beyond any credible theory of recovery." *Id.* at 248. The court noted that, "[a]t trial, [the defendant] did not respond to Dr. Rahn's testimony with its own damage expert, choosing instead to contest the case on liability grounds." *Id.* The court then detailed the defendant's various objections to Dr. Rahn's theory for calculating the plaintiff's lost profits. After detailing them, it concluded:

> It is readily apparent that [the defendant's] challenges to the lost profits calculations have some plausibility. The jury certainly could have taken these criticisms into account and reduced the damage award. Indeed, the jury had that opportunity because [the defendant] raised almost all of these issues in its cross-examination of Dr. Rahn, and in its closing argument. The jury chose to believe Dr. Rahn, who was qualified to render an opinion on these issues. [Citation omitted].

Id. at 248-9.

As in *Superbird*, Kato did not present its own expert witness on damages or provide its own theory of damages. Rather, it satisfied itself by raising plausible objections to Roboserve's qualified expert during cross examination and closing argument. Also as in *Superbird*, the jury had an opportunity to hear the objections, and it chose to believe Roboserve's expert. The jury exercised its prerogative as a fact-finder, and it produced a measured result. Showing that it gave Kato's objections some weight, the jury awarded only $2,100,000 of the $2,300,000 that Roboserve sought.

Also, in *Medcom Holding Co. v. Baxter Travenol Lab., Inc.*, 1990 WL 104039, 1990 U.S.Dist.Lexis 8062 (N.D. Ill. June 29, 1990), we faced a problem similar to the one in this case and, to analyze it, we imported a test from the First Circuit. *Id.* at *12. The test:

> look[s] at three factors in determining whether a lost profits award [is] rationally based on the evidence: (i) whether the plaintiff explained the assumptions on which the profit projections were based; (ii) whether the defendant had an opportunity to expose inconsistencies, inadequacies or inaccuracies in the plaintiff's testimony either by cross-examination or summation; and (iii) whether the defendant could have presented evidence of its own to indicate what

> the outer limits of the plaintiff's damages might have been.

Id. (citing *Wallace Motor Sales v. Amer. Motors Corp.*, 780 F.2d 1049, 1062 (1st Cir. 1985)).

As the court discussed in *Medcom*, Roboserve explained the assumptions on which it based its profit projections. Tr. at 707 *et seq.* Further, Kato had opportunities to expose inconsistencies, inadequacies or inaccuracies. Tr. at 730 *et seq.* and 1059 *et seq.* Further still, Kato could have presented evidence of its own about what the outer limits of Roboserve's damages might have been, but it chose not to, aside from its comments during cross examination and summation.

Therefore, the jury's award satisfies the *Pincus* standard, and we deny Kato's alternative motion.

3. The Fraud Claim

First, Kato contests the compensatory award, mainly based on its belief that the jury awarded Roboserve "benefit of the bargain" damages, the amount that it claimed because of its inability "to get the [broader] Hyatt business."

Roboserve sought the compensatory damages because Kato's fraud prevented it from getting the remaining HRC business, which amounted to an additional 870 units, or from getting "the [broader] Hyatt business." At trial, Roboserve's expert testified that the value of that lost business was $8,009,254. Further, Roboserve sought compensatory damages for the attorneys fees it incurred, which amounted to $12,800.

As discussed above, we agree with Kato that the jury should not have awarded damages for the lost "benefit" beyond the confines of the HRC. We believe, however, that the jury also agreed with Kato and discounted the award by an appropriate amount, making a remittitur unnecessary. Roboserve requested over $8,000,000, and

the jury awarded it only $1,000,000. Given the number of units involved, the average lost profit per year, and the length of the fraud, we believe that the compensatory award satisfies the *Pincus* standard. Tr. at 707 *et seq.*

Second, Kato contests the punitive award, arguing that it is excessive.

"Illinois courts look to three factors in analyzing [the excessiveness of a punitive damage award]: (1) the nature and enormity of the wrong, (2) the financial status of the defendant, and (3) the potential liability of the defendant resulting from multiple claims." [16] *Hardin*, 962 F.2d at 640. "The defendant bears the burden of proving damages are excessive." *Id.*

The "enormity of the wrong" factor may depend on subjective considerations such as the duration of the wrongful activity. "With respect to the first factor, . . . the jury was entitled to conclude that [the defendant's] conduct was not merely a single incident. Rather [the defendant's] deceitful conduct took place over nearly a two-year period, and its actions were deliberate and purposeful." *West*, 846 F.2d at 400. In this case, the deceit lasted even longer than it did in *West*. Therefore, Kato does not carry its burden of proving that the damages are excessive.

The "enormity of the wrong" factor may also depend on objective, mathematical considerations. "The amount of compensatory damages is also an appropriate consideration in evaluating the excessiveness of a punitive damage award." *Medcom*, 1990 WL 104039, at *15, 1990 U.S. Dist. Lexis 8062, at *42. Where a defendant argues excessiveness and "the award [is] less than three times the amount of compensatory damages, the argument is "unpromising," particularly given "the jury's discretion in picking a suitable figure." *Midland Management Corp. v.*

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[16] The issue of multiple claims is inapplicable in this case.

Computer Consoles Inc., 1993 WL 69624, at *1, 1993 U.S.Dist.Lexis 3436, at *4 (March 10), *recons. denied*, 1993 WL 316725, 1993 U.S.Dist.Lexis 11450 (N.D.Ill. Aug. 16, 1993). Generally, a ratio of punitive to compensatory awards of 2.7 "does not by itself suggest an unreasonable" amount. *DeRance, Inc. v. PaineWebber Inc.*, 872 F.2d 1312, *reh'g denied*, (7th Cir. June 19, 1989). In this case, the ratio of punitive to compensatory awards falls safely within the proscribed range. Therefore, again, Kato does not carry its burden of proving that the damages are excessive.

Like the first factor, the "financial status of the defendant" factor may depend on objective, mathematical considerations. "Our research reveals that a typical ratio for a punitive damages award to a defendant's net worth may be around 1%." *Cash v. Beltmann N. Amer. Co., Inc.*, 900 F.2d 109, 111, n. 3 (7th Cir.1990) (providing an extensive list of citations). In this case, the punitive damages award of $6,000,000 and the defendant's net worth of $980,000,000 yield a ratio that is clearly under 1%.

Therefore, the jury award satisfies the *Pincus* standard, and we deny Kato's alternative motion as to the fraud claim.

4. The Wrongful Termination Claim

Kato argues that the award is excessive and that, in any event, the jury calculated the award based on an incorrect starting date.

We disagree that the award is excessive. Again, given the number of units involved, the average lost profit per year, and the length of the contract term, we believe that, except as adjusted below, the compensatory award satisfies the *Pincus* standard. See Tr. at 707 *et seq.* In fact, Roboserve's expert on damages recommended $1,160,302, and the jury discounted it to $850,000.

As we discussed above, however, we agree that the jury calculated the award based on an incorrect starting date.

The jury received a special interrogatory which asked, "If you find that the Concession Agreement was amended, has the sixty calendar month period begun to run?" The jury answered that the calendar period had not begun to run, leading the jurors to award damages for a five year period beginning on January 1, 1994. Yet we granted Kato's motion for judgment as a matter of law about when the calendar period began to run, and we determined that it began on March 1, 1993.

Because there is a three-quarters of a year difference between the starting dates, we remit the amount the jury would have awarded for three-quarters of a year of profits. If the jury awarded $850,000 for five years, it likely awarded $170,000 per year, and $42,500 per quarter. Therefore, we subtract $42,500 $\times$ 3, or $127,500, from $850,000, leaving a compensatory award of $722,500.

Therefore, because we remit $127,500 of the total damage award, we enter a judgment for the remaining amount, which is $9,822,500.

III. Conclusion

For the reasons discussed above, we grant in part Kato's alternative motions for judgment as a matter of law and remittitur, and we deny its motion for new trial.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

May 6, 1996

Before HON. KENNETH F. RIPPLE, *Circuit Judge*
HON. DANIEL A. MANION, *Circuit Judge*
HON. MICHAEL S. KANNE, *Circuit Judge*

No. 95-1371

ROBOSERVE, INCORPORATED,
a Delaware Corporation,
Plaintiff-Appellee,

v.

KATO KAGAKU COMPANY, LIMITED,
a Japanese Company
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 92 C 5248—Brian Barnett Duff, *Judge*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Plaintiff-Appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly.

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.